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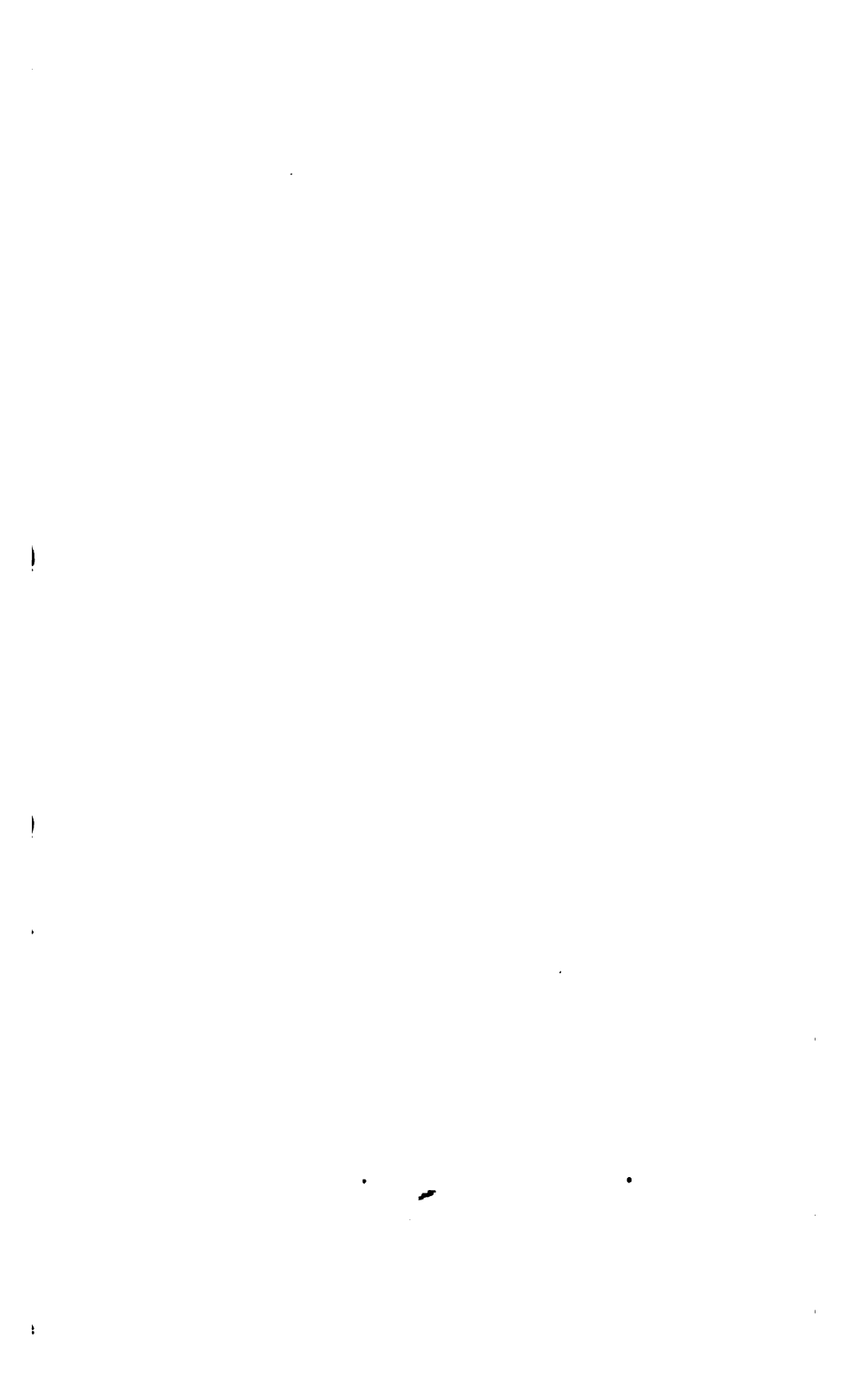
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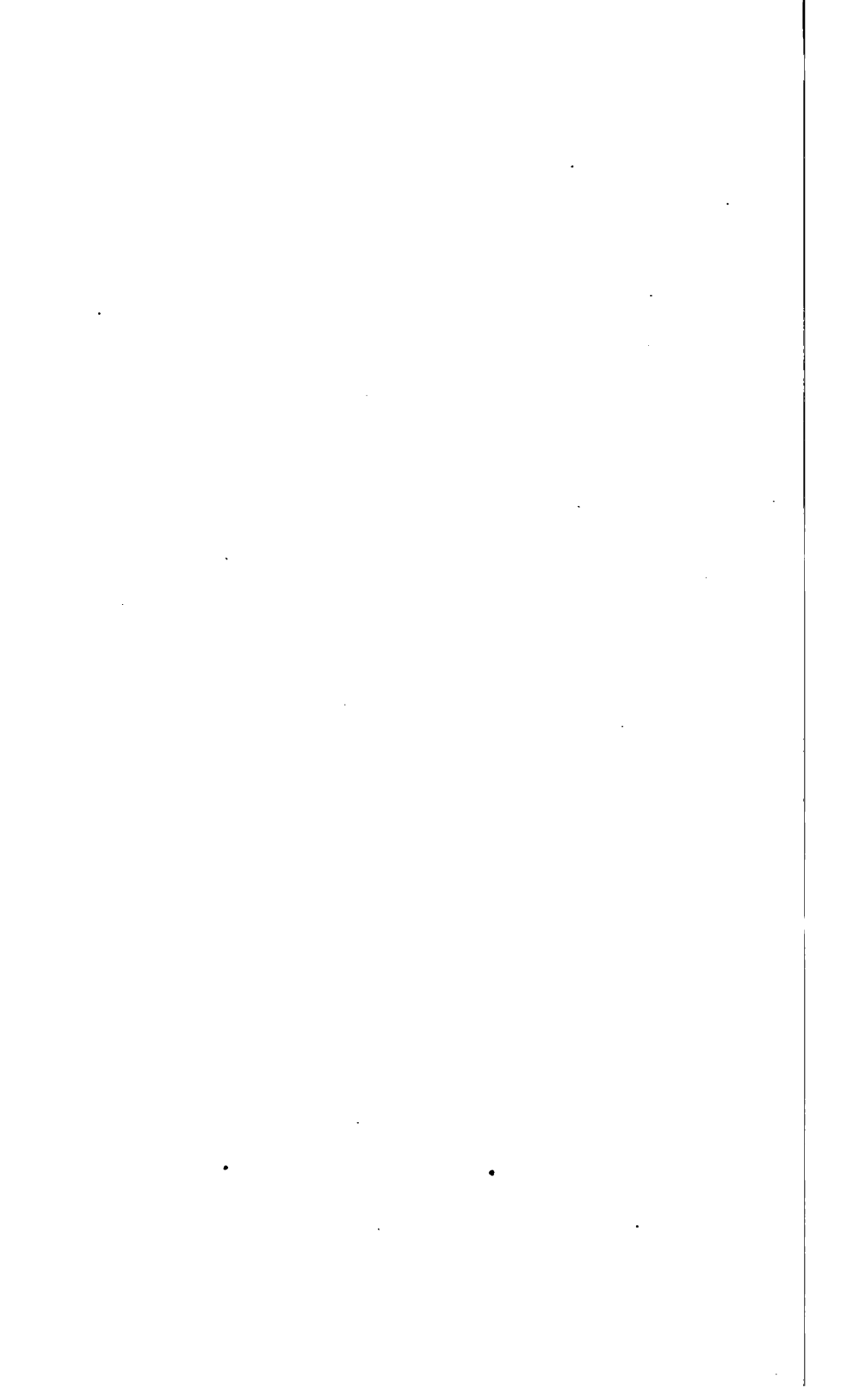
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XVIII.

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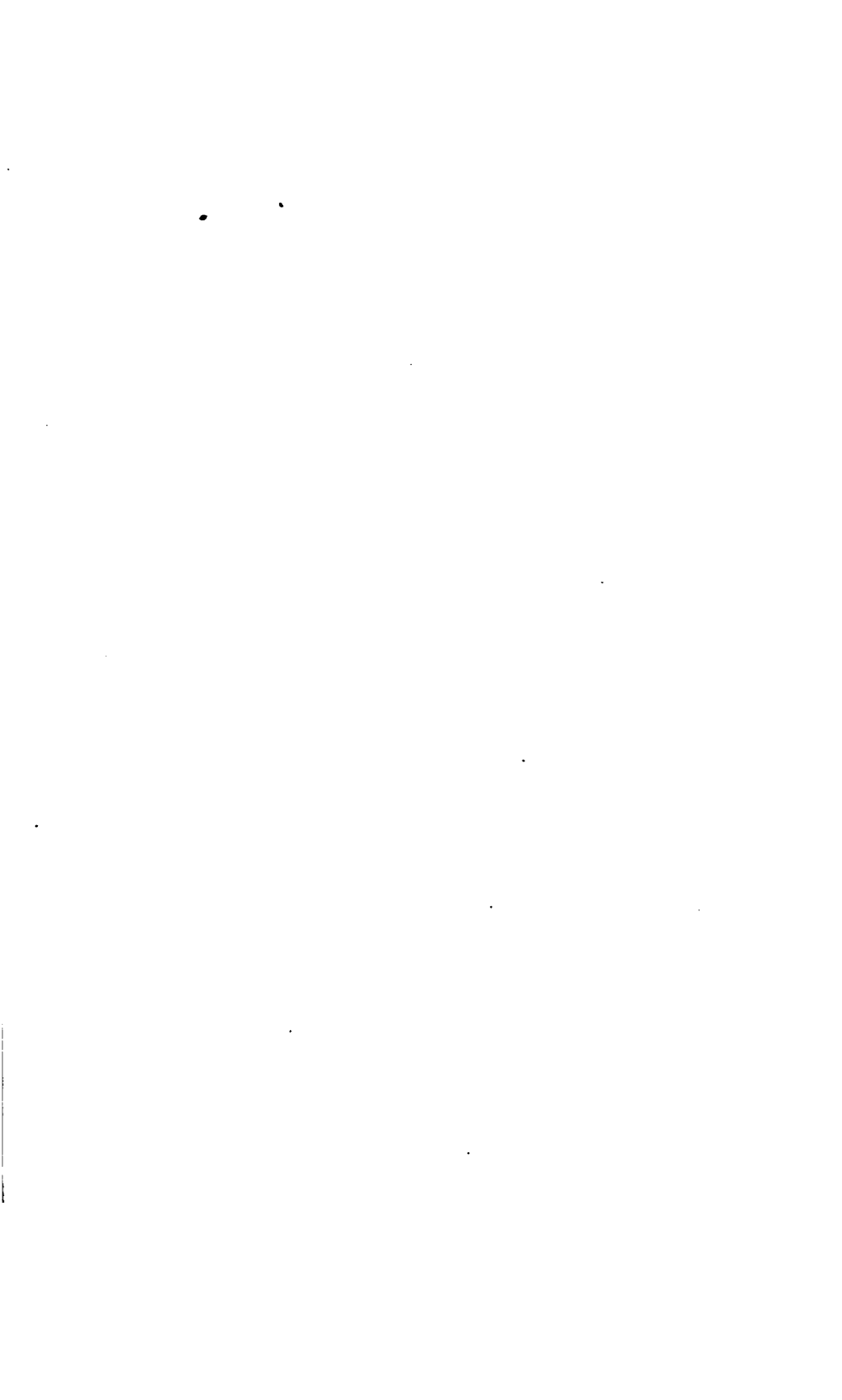
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AMERICAN STATE REPORTS.

VOL. XVIII.



CASES

IN THE

SUPREME COURT

OF

TEXAS.

HOWE v. HARDING.

[76 TEXAS, 17.]

RECEIVER OF RAILWAY. — A receiver empowered to take possession of, control, and operate a railway is, in some sense, the representative of the corporation that owns it.

RECEIVER OF RAILWAY — OBLIGATION TO ENFORCE CONTRACTS. — The court appointing a receiver for a railway corporation is under obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the company, though they may have been improvidently made. The continuance of the obligations of contracts is not dependent on the act or will of a court; nor can a court, in any proper case, refuse to execute them.

RECEIVER OF RAILWAY — SUIT AGAINST — OBLIGATION OF CONTRACTS. — A creditor having a specific right to be paid out of the earnings of a railroad, or a lien on its property in the hands of a receiver, based on a contract made with the company before his appointment, may maintain his action against the receiver; and upon recovering judgment, may have it satisfied out of the earnings of the road or the proceeds of sale of the property.

VENDOR'S LIEN FOR RIGHT OF WAY. — A lien equivalent to a vendor's lien exists in case of a grant of way, where the consideration for the grant is not paid.

RECEIVER OF RAILWAYS — SUIT AGAINST — OBLIGATION OF CONTRACTS. — Where a railroad company, in consideration of the grant of a right of way, agrees, with the grantor, for the erection of a water-tank on his land, for the use of the company, to be furnished with water from a spring on his land, and contracts to pay him therefor, a lien to secure the payment exists on the earnings of the road in the hands of a receiver afterwards appointed; and an action for a breach of the contract will lie, and judgment may be recovered against the receiver, to be satisfied out of the earnings of the road.

Goldthwaite and Ewing, for the appellant.

James E. Hill, for the appellee.

STAYTON, C. J. Appellee alleges that he made a contract with the Houston East and West Texas Railway Company, in 1880, whereby that company, in consideration of the grant of right of way across a tract of land owned by him, and other lands of which he had possession, control, and management, agreed to erect and maintain a water-tank on his land, to be supplied with water from an elevated spring thereon, which was to be used by the company, for which he was to be paid as much per month as the company should pay to any other person on its line for like privilege or service.

He alleges that the tank was erected, pipe furnished by the company at his expense, which was by himself laid from the spring to the tank, a distance of about one thousand feet, and that he thus furnished the company with water necessary for its uses until July 11, 1885, at which time the railway went into the hands of appellant as receiver, appointed by the district court for Harris County, who, since that time, has had exclusive control of all the property of the company, and has operated the road over the way granted as the consideration for the company's promise.

He further alleges that appellant permitted the tank to remain, and used water from the spring, until July, 1887, when the tank was removed, and appellant ceased to use water, and refused, from that time until this action was brought, to pay therefor.

It was alleged that other persons on the line for similar water service received fifty dollars per month.

It appears, from the evidence, that two instruments were executed at the time the contract was made, both of which went into the possession of the railway company.

Notice was given to produce them; but only one was produced, and the contents of the other were proved by oral testimony.

The contract produced was one signed by and purporting to be made by Nancy S. James, and in the usual form conveyed the right of way over the land, and as to the consideration for the grant of way, contained the following language: "And as a further consideration for said right of way, the company agrees to erect a tank on said premises, provided there be sufficient water, and contract with the above party, or her authorized agent, to keep the same supplied."

The other paper was proved to evidence a contract in regard to tank, furnishing water, and compensation therefor as al-

leged, and thereby the compensation was made payable to appellee.

It was shown that, in 1866, title to the entire tract of land over which right of way was granted was in Nancy S. James; but appellee was permitted, without objection, to state that she heard the contracts read, and that it was made for his benefit, with her consent, the inference being that the promise was made directly to him, and that he had lived on the land, and been in actual possession, since 1854, claiming it; that his homestead of two hundred acres was nearly one thousand varas square, over which the road ran more than one mile circuitously, and that on this was the elevated spring and water-tank.

Miss James was shown to be a near relative, who had been a member of appellee's family for more than fifty years; and the inference from the evidence is, that while title to a part of the land, or it may be the whole, stood in her name, that the beneficial interest was in appellee.

There was a judgment in favor of appellee for water service under the contract from April 1, 1887, to December 20, 1888, amounting to \$662.

There is no complaint that the judgment is too large; but it is contended that, under the facts, no judgment whatever could be rendered against the receiver for the value of water service, as provided by the contract, after he ceased to use the water from the spring.

The assignments presenting this question are as follows:—

"The court erred in its main charge to the jury, wherein it stated, in effect, that if the defendant railway company made with plaintiff the contract stated in the petition before the appointment of the receiver of the former, then this defendant, as receiver, was liable to the plaintiff upon said contract.

"The court erred in instructing the jury, both in its main charge and in the special charge given at the request of plaintiff, to the effect that if, prior to the time defendant receiver was appointed, the railway company and plaintiff entered into a contract whereby, in consideration of plaintiff's conveyance of a right of way over plaintiff's land, the railway company agreed to pay plaintiff for supplying water to a tank on said right of way as much per month as was paid any other person for the same service at any other point on said railway, and that the defendant receiver, after he took charge of said railway, used the right of way so conveyed in operating said rail-

way, then that he was liable on said contract, and it was binding on him, as receiver of said railway company."

The proposition under these assignments is, that "a receiver is not the representative of nor in privity with the company whose property he holds, but is the mere hand of the court appointing him; and the court cannot be bound to the continuance and fulfillment of the company's personal contracts, improvident and disastrous though they be, without destroying the court's independence and success in the management of the trust assumed, and creating a privity that the settled rules of law deny."

It is certainly true that courts have no power to create a privity which the law declares shall not exist, but it is a mistake to assume that a receiver empowered to take possession of, control, and operate a railway is in no sense the representative of the corporation that owns it; but this case does not call for a decision as to the extent of his representation, nor as to the circumstances under which his acts will be binding on the company whose property he controls.

It is also erroneous to assert that a court appointing a receiver is under no obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the company, though they may have been improvidently made. The continuance of the obligation of contracts is not dependent on the will or act of a court, nor can a court in any proper case refuse to execute them.

It is true, however, that it is not every contract a company may have made which a court administering its property through a receiver will cause to be satisfied out of the funds subject to its control; for that must depend on the right to be paid out of the earnings or proceeds of the property in the hands of the court. This specific right may depend on the existence of a lien on the property secured by contract or operation of law; or in the case of public agencies, such as railways, such specific right to compensation to be paid out of earnings of the business, and in some cases out of the proceeds of the *corpus* of the property, will arise; for parties holding liens on such property, knowing that it must continue to be used in the public business for which the corporation to which it belongs was created, must be understood to consent when they ask that the property be placed in the hands of a receiver that the cost of operating the business shall first be paid, even

though resort to the *corpus* of the property be necessary to accomplish this.

The cases have gone so far as to hold property in the hands of a receiver liable for wages earned before his appointment, for debts contracted to other railway companies in the ordinary course of business, for expenses incurred in completing unfinished road, and making other permanent improvements, as well as for debts contracted for supplies before the appointment.

If the receiver appointed to take possession of and operate a line of railway, part of which is held under lease by the company of whose property he is given control, does so, or if, under like circumstances, he takes possession of and uses cars which the company held under contract to purchase, it has been held that the rents, price of cars, or compensation for their use was properly directed to be paid out of earnings.

The contract in question is not shown to have provided, in express terms, how long appellee should render water service and be entitled to the agreed compensation therefor; but as compensation to be paid for this service embraced the consideration for right of way, the obligation to make compensation must be held to have been intended by the parties to continue as long as the right for which it was to be paid is exercised, unless appellee should violate his part of the contract.

Has appellee the specific right to be paid out of the earnings of the road, or a lien on property in the hands of the receiver? If he has either, the action was properly brought against the receiver, though based on a contract made with the company before his appointment; for it may be asserted that an action against a receiver may be maintained when the creditor has specific right to payment out of the funds in his hands.

Under the rulings before referred to, we do not see how the liability of the receiver, or rather the earnings and property in his hands, can be held not subject to the claim of appellee.

The contract on which appellee relies was valid and binding on the company now represented by appellant; he has used the right secured and existing only by reason of the contract on which appellee bases his claim. This was absolutely necessary to the operation of the road appellant was directed to operate, and the court which appointed him could not have intended that he should enjoy the benefit of the contract without assuming its burdens.

If appellant, after making known to the court that appointed

him that the contract proved had been made before his appointment, had asked that he be permitted to use the right of way, but that he be relieved from paying for it in accordance with the contract, that court would not, and legally could not, have given such permission without at the same time requiring appellant to make the compensation agreed upon for the right of way, which the receiver necessarily had to use, or acquire another, to preserve the continuity of the line.

The grant of right of way was on condition that it should be paid for, and without this none could vest absolutely, and no court could direct its receiver to hold and use this and at the same time refuse to pay for it in accordance with the terms of the valid contract through which alone permission was obtained and held.

That contract, if carried out, would entitle appellee to payment from the earnings of the road as current expenses, if not from the proceeds of the *corpus* of the property, even if no lien existed to secure it. If this were not so, then the inquiry would arise whether a lien existed to secure compensation for the right of way. If so, appellee was entitled to judgment against the receiver, to be paid out of the earnings of the road or proceeds of sale of the property; for other lien creditors cannot be heard to claim that property which came into the hands of the debtor encumbered with a lien for purchase-money should be subjected to the payment of their claims until appellee is paid.

If appellee was the owner of the land over which the railway runs, under the uncontroverted facts the company has the right to it, whether he signed the conveyance or not; but as compensation provided by the contract for water service was, in part at least, the consideration therefor, a lien on the right of way, though but an easement, exists to secure in so far its payment.

If title to the land was in Miss James in fact, or only apparently, then under the facts it cannot be denied that by her act the right of way vested in the company; but as the promise to pay the consideration therefor was made to appellee with her consent, he has the same right to enforce any existing lien she would have had had the promise been made to her.

This has been recognized in those cases in which one person sells land to another on credit, who, under agreement of the parties, executes note to a third person for the purchase-money.

That a lien equivalent to the ordinary lien held by a vendor of land exists in case of grant of right of way, where the consideration for the grant is not paid, seems to be very generally recognized.

That such a lien exists was held or recognized in the following English cases: *Walker v. Eastern Counties R'y Co.*, L. R. 1 Eq. 195; *Munns v. Isle of Wight R'y Co.*, L. R. 8 Eq. 653; *Ferrers v. Stafford etc. R'y Co.*, L. R. 13 Eq. 524.

In *Dayton etc. R'y Co. v. Lewton*, 20 Ohio St. 401, it appeared that the land-owner by binding contract agreed to grant right of way, in consideration of which the company agreed to pay a sum of money at a future day, and to construct road crossings and cattle-guards on the owner's land.

The company took possession, and the owner was held to have lien for unpaid purchase-money, as well as for damages for failure to construct in accordance with the contract, and that the entire road was subject to sale to satisfy sum due.

In *Provolt v. Chicago etc. R. R. Co.*, 57 Mo. 263, the right to lien for unpaid purchase-money for right of way seems to have been recognized; and while it was held that ejectment would not lie, the company having occupied the way without objection made on the ground that compensation was not first paid, the court declared that for the protection of the land-owner "a court of equity would unquestionably interfere, if necessary, and place the road in hands of receivers until the damages were paid from the earnings."

That lien existed was recognized in *Gillison v. Savannah etc. R. R. Co.*, 7 S. C. 180; and in *McAulay v. Western Vt. R'y Co.*, 33 Vt. 322; 78 Am. Dec. 627, it was recognized that such a lien would exist if not cut off by statute.

Elementary writers generally recognize the existence of such a lien: 1 Redfield on Railroads, 246; Mills on Eminent Domain, 144; 1 Wood on Railroads, 209; 2 Wood on Railroads, 785.

The price agreed to be paid for water service was not solely the consideration for right of way; for it must be presumed that the water placed in tank ready for company's use was deemed of some value, and that the sum agreed to be paid was as compensation for both things.

The right to recover from the receiver for right of way is clear, and no effort was made in the court below to have the compensation for each ascertained, nor is there any complaint here that the judgment is excessive.

Under this state of facts, we are not called upon to decide whether, in the absence of statute, the contract, in so far as it was solely for the purpose of securing water, was one that the receiver would be bound to carry out; but as the contract was valid, and by the company, as well as by the receiver, for a long time deemed advantageous or necessary to the operation of the railroad, it would seem that the receiver had no right to discontinue the use of the water without direction from the court so to do. Had application been made for leave to discontinue use of and payment for water, this, in good conscience, could not have been granted under the facts proved without making compensation to appellee for expenditures, as well as such loss as he might otherwise sustain through breach of the contract. Under the statute, however, we think there can be no question. That provides that "all judgments, claims, or causes of action when determined, or existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage actions; and the same shall be a lien on such earnings": Gen. Laws 1887, p. 121.

That a claim and cause of action existed against the railroad company under the contract sued on we have already stated, and judgment might thereon have been properly rendered in this case against the company made a defendant. That this was not done does not defeat the right, and the claim being one payable under the statute out of the earnings of the the road, the judgment was properly rendered against the receiver.

The direction in the judgment as to the manner of payment does not operate to the prejudice of the receiver or other creditors, and will be affirmed.

RECEIVERS — RAILROAD COMPANIES. — Possession of a railroad by a receiver appointed by a court cannot be regarded as the possession of the railroad company: *Ohio etc. R. R. Co. v. Davis*, 23 Ind. 553; 85 Am. Dec. 477. But the receiver of an insolvent corporation is in a sense the representative of both the corporation and the creditors of the corporation: *Pittsburg C. Co. v. McMullen*, 119 N. Y. 47; *Bliss v. Doty*, 36 Minn. 168.

RECEIVERS. — A receiver takes the property subject to all existing equities and liens: *Bates v. Wiggin*, 37 Kan. 44; 1 Am. St. Rep. 234.

WESTERN UNION TELEGRAPH COMPANY v. MOORE

[75 TEXAS, 66.]

TELEGRAPH COMPANY — DAMAGES FOR FAILURE TO DELIVER MESSAGE. — A recovery in damages may be had against a telegraph company for mental suffering resulting from a failure to deliver with diligence a message announcing the sickness or death of a relative, provided the language employed in the message is reasonably sufficient to put the company upon inquiry as to the relationship between the sender and the person addressed, and to apprise the company that the object of the message is to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death.

TELEGRAPH COMPANY — NOTICE FROM FACE OF MESSAGE — DAMAGES FOR NON-DELIVERY. — A dispatch in the words "Billie is very low; come at once," sent by a sister to her brother, and relating to another brother, is sufficient, on its face, to give the telegraph company notice of its object, and of the relationship between the parties, and to render it liable in damages for mental suffering caused by a failure to deliver the message promptly.

APPEAL from a judgment for two thousand dollars against a telegraph company for failing to deliver a message promptly.

Stewart and Stewart, for the appellant.

McKinney and Leigh, for the appellee.

GAINES, A. J. In November, 1888, the appellee, who then resided at Trinity, Texas, had a sick brother at Dallas. The brother, at the time, resided with his sister at the latter place. Appellee, being informed of his brother's illness, wrote to his sister, and requested her to give him notice, by telegraph, of his brother's condition in case he should grow worse. On the nineteenth day of the month above named, the sister caused a message, signed by her, to be delivered to the appellant's agent at Dallas, for transmission to the appellee at Trinity, which was in the following words: "Billie is very low; come at once." The message was not promptly delivered. The company's agent at Trinity gave it to a porter, to be handed to appellee, but the porter, not having found him, returned it to the agent, who deposited it in the post-office. The appellee received it on the 20th, at about seven o'clock in the evening. He immediately went to Dallas, and found his brother dead. He testified that if the message had been promptly delivered, he would have reached Dallas in time to have seen his brother alive.

Appellee brought this suit to recover damages for his mental suffering, alleged to have been caused by the default of the telegraph company in not delivering the message promptly,

and his consequent failure to arrive at the bedside of his brother in time to be with him in his last moments.

The case appears to have been tried upon the theory that the plaintiff could not recover beyond the amount paid for the transmission of the message, unless he should show, by extrinsic evidence, that the company had notice that the person named in the message was his brother. It is true that the damages recoverable in an action of this character are limited to such as may reasonably be presumed to have been in the contemplation of the parties at the time the contract is made. But in the case of *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, it was held, in effect, that a recovery could be had for mental suffering resulting from a failure to deliver with diligence a telegraphic message announcing the sickness or death of a relative, provided the language employed in the message was reasonably sufficient to put the company upon inquiry as to the relationship between such person and the party addressed, and to apprise them that its object was to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in the case of death. The same principle was affirmed in the case of *Western Union Tel. Co. v. Feegles*, 75 Tex. 537.

We are of opinion that, tested by the rule announced in the cases cited, the message under consideration was sufficient to reasonably apprise the defendant of the consequences to plaintiff of its failure to deliver the message according to contract. The conclusion to be drawn from the language of the message is, that a near relationship existed between the person mentioned in the message and the person to whom it was addressed, and that, upon its receipt, the latter would probably set out at once to attend his relation in his extremity. Such being the case, it would be unreasonable to hold that the company, upon the receipt of the message, should not have contemplated the consequences which were likely to result to plaintiff from a failure to transmit it with diligence and dispatch.

The conclusion that the face of the message was sufficient to give the defendant company notice, and to render it liable for damages claimed in this case, if in fact it made default, practically disposes of all the questions raised upon this appeal. The plaintiff testified that some two or three days before the message was delivered at Dallas for transmission, he called upon the defendant's agent at Trinity, and informed

him that he had a brother sick at Dallas, concerning whom he was expecting a message, and requested that it should be sent to the hotel. The court charged, in effect, that if plaintiff did so inform the agent, that this would be sufficient notice to the company of the relationship between the plaintiff and the person mentioned in the message. It may be doubted whether or not this charge was correct. At the time the information is claimed to have been given, there were no contractual relations existing between the plaintiff and the company. Can it be held that the company's operator at Trinity was its agent to receive information to affect the damages recoverable for a breach of a contract subsequently to be made at a distant station? However this may be, the appellant was not prejudiced by the charge of the court. The company had notice from the face of the message, and it did not harm the defendant to instruct the jury that notice may have been conveyed in another way, although such charge may not have been correct in point of law.

The defendant requested the court to instruct the jury "that the mere receipt of the message, and negligence in delivery, would not, of itself, entitle the plaintiff to recover beyond the amount paid for transmitting the message." It appears, from what has already been said, that we think that the request was properly refused.

It is also insisted that the verdict and judgment are contrary to the law, because there was no evidence that the defendant company ever had any notice of the relationship between the plaintiff and the person named in the message. The message itself was notice.

For the same reason, the admission of the testimony of the witness Hughes, if error, was harmless. It tended merely to show that the defendant company had notice of the relationship of plaintiff and his brother.

There is no error in the proceedings which demands a reversal of the judgment, and it is therefore affirmed.

TELEGRAPH COMPANIES—LIABILITY FOR FAILURE TO DELIVER A MESSAGE—MEASURE OF DAMAGES.—Mental anguish constitutes an element in the damages recoverable against a telegraph company for delay in delivering a dispatch, the nature and importance of which is patent upon the face of the message; and the company is bound to take notice of the importance of messages relating to sickness or death: *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920, and particularly note; *Loper v. Telegraph Co.*, 70 Tex. 690; *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

BURKE v. HANCE.

[76 TEXAS, 76.]

GARNISHMENT OF DEBT IN SUIT.—During the pendency of a suit against a debtor by his creditor in one court, the debtor cannot be compelled, as garnishee, to defend a suit in a different court by one seeking a judgment against him for the same debt; but where, after asserting his defense, judgment has been rendered against him in the garnishment proceeding, and he has failed to pursue his legal remedies to relieve himself from the erroneous judgment, he cannot enjoin the collection of the creditor's judgment by pleading the judgment in the garnishment proceeding, nor can the plaintiff therein intervene to prevent the collection of such judgment.

GARNISHMENT OF FINAL JUDGMENT—EXEMPTIONS.—A final judgment for conversion is subject to garnishment in an action in another court, when there is nothing to show how much of the judgment proceeded from exempt property, and part of the property converted was not exempt.

W. B. Denson, for the appellants.

Wharton Branch, for the appellee.

HENRY, A. J. About the year 1886, James G. Burke brought suit in the district court of Galveston County, against W. B. Hance, to recover damages for personal property wrongfully taken and converted by said Hance.

On the eighteenth day of February, 1888, Burke recovered judgment for the sum of \$604.16. This judgment was afterwards affirmed by this court. The record before us and the report of the former case show that it was brought here by appeal: *Hance v. Burke*, 73 Tex. 62.

One A. Chimene had recovered against Burke two judgments in a justice court in Harris County.

On the third day of March, 1888, Chimene sued out against Hance writs of garnishment, which were served upon him in Galveston County, where he resided.

On the twenty-third day of March, 1888, Hance answered the writs, denying, in general terms, that he was indebted to Burke, and stating specially the fact, and the date of the recovery of the judgment against him in the district court of Galveston County, adding: "But respondent says said judgment is utterly unjust, and will be immediately removed by writ of error from said district court to the supreme court of the state, and that respondent is legally advised and firmly believes that said judgment will be duly reversed by said supreme court, and the case on which it was rendered be remanded for another trial, at which trial respondent is legally advised and

firmly believes he will wholly defeat the unjust and iniquitous claims upon which said Burke recovered judgment. Further, respondent says that he now has pending in the district court of Galveston County a suit against said James G. Burke for damages in the sum of five thousand dollars, for which amount he expects to recover judgment against said Burke at the ensuing April term of said district court. Wherefore respondent says said Burke is indebted to respondent in excess of any indebtedness respondent may possibly be under to said Burke in case the judgment referred to in favor of said Burke shall be affirmed by the supreme court."

On April 30, 1888, judgments were rendered in the justice court in favor of Chimene, and against Hance, in both of the cases. Hance failed to appeal or take any other steps to relieve himself from these judgments.

Execution having been issued upon the judgment in favor of Burke, and levied upon the property of one of the sureties of Hance upon his appeal bond, this suit was brought by Hance to enjoin further proceedings under said execution, and among other things, setting up the rendition of said judgments against him as garnishee as a cause why said execution and the judgment on which it issued should not be collected. The petition charges that said judgments are unpaid, and amount to the sum of \$486.12.

It is further charged that executions on said justice's judgments have been issued, and are in the hands of the sheriff of Galveston County for collection. The petition complains that said justice's judgments ought to be credited on said Burke's judgment, and that plaintiff ought to be protected from a double payment, and prays that defendant Burke be cited to appear and show cause why the amount of said justice's judgments should not be paid to Chimene.

W. B. Denson intervened, and alleged and proved that in the year 1886 Burke transferred to him one half of his claim against Hance. He also alleged an additional interest in it; and another intervenor (Halsey) alleged an interest in the whole of the claim that was in excess of the amount claimed by Denson. Chimene also intervened, and adopted the allegations and prayers of plaintiff's petition.

The court rendered judgment in favor of Denson for one half of the amount of the judgment recovered by Burke against Hance, and in favor of Chimene for the balance of it, less \$25.20, appropriated to the payment of costs.

The sureties of Hance had paid the money into court. Burke and the intervenors Denson and Halsey prosecute this appeal.

The only question that is presented to us for decision relates to the judgment in favor of Chimene. It is said that a "negligent garnishee is no more entitled to protection than any other negligent party, and he is as much bound to look after the proceedings against him, and protect himself from an improper judgment, as a defendant in an ordinary suit. If by his failure in this respect the plaintiff gain an advantage over him, he is without relief": Drake on Attachment, sec. 6582.

In the case of *Miller v. Taylor*, 14 Tex. 538, Miller had a judgment in a justice court against Hall. Subsequently there was a proceeding by arbitration between Leaverton and Hall, in which a judgment for money was rendered in the district court against Leaverton, and in favor of Hall, which was subsequently transferred by Hall to Taylor. During the pendency of the arbitration proceeding, Miller sued out a writ of garnishment against Leaverton. Leaverton answered as garnishee after judgment against him had been rendered in the district court in favor of Hall, and on his answer another judgment against him in favor of Miller was rendered in the garnishment suit. Miller and Taylor were both proceeding to enforce their judgments, and Leaverton brought suit for an injunction, and to compel them to interplead, he bringing the amount of the debt into court.

Wheeler, J., said: "The first and principal question to be determined is, whether the garnishee could be held liable, under the circumstances of this case, upon the process issued from the justice court, and the better opinion, upon authority, seems to be that he could not, by reason of the proceeding pending in another court, not of a concurrent, but of a different, jurisdiction, at the time of suing out the process against the garnishee. It has been made a question whether a judgment debtor can be charged as garnishee of the judgment creditor, and on this point there has been a conflict of opinions and decisions. But the better opinion, upon authority and reason, seems to be that he can. . . . The court did not err in holding the judgment (on the award) valid and obligatory, notwithstanding the judgment rendered by the justice in the matter of the garnishment. However that judgment might embarrass the garnishee, it could not impair the force of the judgment of the district court rendered upon the award. If

the garnishee in his answer disclosed the proceedings in the district court, it was error in the justice to give judgment against him; and if the plaintiff in the garnishment had sought to avail himself of the erroneous judgment to oppress the garnishee, the latter might have been driven to a proceeding by *certiorari* to reverse the judgment of the justice." This court held that the money was rightly awarded to the assignee of the plaintiff in the district court judgment.

In the case of *McRee v. Brown*, 45 Tex. 503, it appears that McRee, as surviving partner of A. B. James & Co., sued Brown for debt in the United States circuit court. Ireland had a judgment against McRee in the county court of Guadalupe County.

Ireland sued a writ of garnishment out of the county court, and caused it to be served on Brown, who answered, admitting an indebtedness to McRee, on which answer Ireland took judgment against Brown as garnishee, and Brown paid the judgment. Judgment was also rendered in the circuit court in favor of McRee against Brown, and he paid that, too. Afterwards he sued McRee to recover back from him the money paid on his judgment.

In the opinion rendered by this court it is said: "But though Brown, as he alleges, has paid the same debt twice, it may be questioned whether he has taken the proper course or applied to the proper tribunal for relief. From the statement of facts incorporated into and forming a part of the judgment, it seems that his debt to James & Co. was one for which he was jointly liable with Mayfield and Cotton. If it was a partnership debt, it is held in many courts that he could not be forced to pay it on a separate writ of garnishment, and if he has done so without a proper effort to protect himself, he is not entitled to relief. It is not shown whether the writ of garnishment by Ireland was served before or after the bringing of the suit in the United States court. If it was afterwards, it seems to be held by the supreme court of the United States (*Wallace v. McConnell*, 13 Pet. 136) that the garnishment cannot arrest the suit or preclude the plaintiff from recovering judgment in that court, nor can the garnishee protect himself by the garnishment *puis darrein continuance*. And if Brown was entitled to relief against the last judgment, it may also be well questioned whether he should not have gone to the court rendering the judgment to obtain it."

We think these cases sufficiently announce the doctrine

that during the pendency of a suit against a debtor by his creditor in one court the debtor cannot be compelled to defend, as garnishee, a suit in a different court by one seeking a judgment against him for the same debt.

There are, at least, some defenses which the garnishee is required to assert in all cases when they exist, and still others that he is required to make known when they are known to him. We think the rule is a just one that relieves him from asserting his defenses against the same debt in different courts at the same time; and when a suit is pending in the name of his creditor for the debt, it ought to be held a complete defense for him to answer the pendency of such suit in any other court where he may be cited to answer for it as garnishee. The rule is a useful one, too, to prevent confusion in jurisdictions and multiplicity of suits, and to preserve the substance, instead of the shadow and form only, of litigation to the court that first acquired jurisdiction.

In the matter before us, the defense which was proper and necessary for his protection was pleaded by Hance, the garnishee. The defense was disregarded by the justice of the peace.

It was the duty, as well as the right, of Hance to pursue such remedies, by appeal or otherwise, as the law furnished him with, to relieve himself from the erroneous judgment. That he did not do so furnishes no reason for his being relieved in the manner now sought by him. If he had properly defended the garnishment suit, no judgment against him could have been maintained. If defended properly, the law would not have permitted the plaintiff in the garnishment suit to prevent or interfere with the collection of his debt by Burke in his prior suit. Hance, and not Burke, must be charged with the consequences of the negligence of the former.

Whatever legal rights Chimene acquired by his judgments against Hance as garnishee must be pursued by appropriate process against Hance. He has shown no right to intervene or recover in this cause, and for the error in allowing him to recover any sum, the judgment must be reversed.

It is insisted that as the property converted by Hance, and for which the judgment in favor of Burke was rendered, was exempt from forced sale, the judgment recovered by Burke is protected also.

If the evidence showed that the judgment was rendered for the seizure of exempt property, we think the proposition con-

tended for would be correct; and if that fact was known to the garnishee, it would be his duty to plead it. The evidence shows that all of the property on account of which Burke sued Hance was not exempt from forced sale, and as there is nothing to show how much of the judgment proceeded from exempt property, that principle cannot be applied in this case. It is not our purpose to decide that a judgment final in the courts of this state, when all proceedings in the suit in which it was rendered, whether original or appellate, are at an end, is not subject to garnishment in other suits pending in the courts of this state, without regard to any question of inferiority of the courts.

While authorities conflict on the question, we are of the opinion that they are subject to garnishment in such cases, by writs sued out after the termination of all proceedings.

Such other questions as may arise in the trial of this cause, if any such there be, are not before us in a way that we can pass upon them.

The judgment is reversed, and the cause is remanded.

GARNISHMENT — JUDGMENT DEBTORS. — Debts reduced to judgments may be attached where the judgments and attachments are in the same court; but such a case must be distinguished from one where the judgment and attachment are in different courts of the same state: *Skipper v. Foster*, 29 Ala. 330; 65 Am. Dec. 405, and note; and ordinarily, the rule is broadly stated that judgment debtors are not subject to garnishment: *American Bank v. Snow*, 9 R. I. 11; 95 Am. Dec. 364, and note.

MISSOURI PACIFIC RAILWAY AND INTERNATIONAL AND GREAT NORTHERN RAILWAY v. WHITE.

[76 TEXAS, 102.]

MASTER AND SERVANT — DUTY TO INFORM SERVANT OF EXTRA HAZARD AND DANGER. — A brakeman ordered to couple cars of peculiar, unusual, and extra-hazardous construction, and with which he is entirely unacquainted, should be notified by the company of their unusual construction, and of the danger arising therefrom; and a failure to give such notice renders the company liable in damages for resulting injury to the brakeman.

Dotson and Richardson, for the appellants.

Etheridge and Dashiell, for the appellees.

ACKER, P. J. Appellee brought this suit to recover damages for personal injury, which caused the permanent loss of

the use of his hand, while he was employed by appellants as a brakeman on their freight trains, in which capacity he had served from the thirty-first day of October to the twenty-fourth day of November, 1887, when he received the injury. There was verdict and judgment for plaintiff for seven thousand five hundred dollars. It was alleged, and the plaintiff testified, that the injury was caused by the unusual and hazardous construction of the couplings of certain foreign cars composing a circus train which defendant companies received at Palestine, to be transported over their road to Tyler, Texas; that he was familiar with the construction of the cars belonging to and in general use by the defendants and other companies, but had never before seen cars constructed like those composing the circus train, which were extra-hazardous because of having dead-woods or buffer-blocks on each side of the draw-heads; that these buffer-blocks prevented the coupling being made in the usual way, and required the brakeman to hold the pin with one hand above the blocks, and to guide the link with the other below the blocks, in making couplings; that in attempting to make a coupling between these cars at Tyler, in obedience to an order of the conductor of the train, his hand and wrist were caught between the buffer-blocks, and crushed, rendering him a cripple for life; that he had had but a few weeks' experience as a brakeman; that he was not informed of the peculiar construction of the circus-cars, nor warned of the extra danger therefrom; that if the couplings to these cars had been such as were in use on defendants' roads, he would not have been injured; that when he was ordered to make the coupling, the cars were within two or three feet of each other, one moving towards the other, and he stepped in between them, and attempted to make the coupling in the usual way, without knowing of the existence of the buffer-blocks, which he did not notice until he received the injury.

The only proposition submitted under the first assignment of error is, "that a servant is presumed to have assumed all of the risks ordinarily incident to the business or employment in which he engages; also, all other open and visible risks, whether usually incident to the business, or not."

In the case of *Missouri Pacific R'y Co. v. Callbreath*, 68 Tex. 528, a case very similar in every particular to this, it was said: "As a general principle, the law is well established that one who accepts the employment of another assumes all

ordinary risks incident to such employment, and cannot recover for injuries resulting therefrom. And as a general rule, it is not the duty of the employer to instruct him as to the rules of the service, or warn him of the dangers incident thereto, unless information be asked: *Missouri Pac. R'y Co. v. Watts*, 64 Tex. 568.

"But this rule is subject to some qualifications. It was held by this court, in the case last cited, that the servant being inexperienced, and ignorant of the dangers of the service upon which he was just entering, it was the duty of the company to have informed him of those dangers. The law is thus stated by a well-known text-writer: 'Where there are hazards incident to an occupation which the master knows, or ought to know, it is his duty to warn the servant of them fully, and failing to do so, he is liable to him for any injury that he may sustain in consequence of such neglect; and this rule applies even where the danger or hazard is patent, if through youth, inexperience, or other cause the servant is incompetent to fully understand the nature and extent of the hazard': Wood on Master and Servant, 714. . . . In the case before us, it appears that the car which caused the injury was used only in connection with a patented invention, and only upon the lines of two railway companies, so far as the evidence discloses, and that the proportion of these cars to those of the usual and regular construction was not more than one in a thousand. It further appears that appellee, though of long experience as a brakeman, had never seen a car like the one in question, and never saw the peculiarity of this until the injury was inflicted. All other cars were capable of being safely coupled by the helper standing between them, and this was the usual mode of making the coupling. Under these circumstances, can it be said that appellee's experience availed him in avoiding the danger in this case? We think, therefore, it was the duty of appellants to have informed appellee of the use of these construction-cars upon their roads when he entered their service upon the yards, and of the danger of attempting to couple them in the usual way; and that their failure to do so was negligence, and renders them liable for the injury."

The analogy between the case from which the foregoing lengthy quotation is made and this case is so striking that but little is left for us to say in disposing of the question presented by the first assignment of error. Callbreath was an

experienced brakeman, having been engaged in that service for years on different roads, and consequently familiar with the construction of cars in ordinary and general use upon railroads, but had never seen such a car as caused his injury until at the time his injuries were received.

In this case, while White had had very little experience as a brakeman, he had become accustomed to the construction of the cars in the service of defendants, and which were in general use by railroads, and could couple and uncouple them with safety. The cars which caused his injury were of peculiar, unusual, and extra-hazardous construction, with which he was entirely unacquainted, never having seen such before, or noticed these until at the time of the accident, and we think the companies should have notified him of their unusual construction, and warned him of the danger therefrom. The conductor testified, it is true, that he notified the plaintiff of the unusual construction of the circus-cars, and warned him to be careful; but this was contradicted by plaintiff, which made a question peculiarly within the province of the jury. It appears, from the evidence, that the construction of the circus-cars made them extra-hazardous, and it was the duty of defendants to know that they were so, and to warn the plaintiff of the increased danger he was subjected to in handling them. We therefore conclude that the first assignment of error is not well taken.

The next assignment of error presented is claimed to be on "fundamental error of law, apparent on face of record," and is as follows: "The court below erred in overruling appellants' motion in arrest of judgment, because the verdict of the jury was so vague and indefinite and uncertain that no valid judgment could be rendered thereon."

We think it a sufficient answer to this assignment to set out the verdict:—

"We, the jury, find for the plaintiff damages to the amount of seven thousand five hundred dollars.

"T. T. SHERMAN, Foreman."

Our attention has not been called to any particular in which the verdict is vague, indefinite, and uncertain, and we are unable to detect any defect or insufficiency in it.

The fifth and only other assignment of error presented is to the effect that the verdict of the jury is contrary to the evidence.

Without quoting the evidence, we deem it sufficient to say that we think the evidence previously stated in this opinion sufficient to sustain the verdict. We have read the facts carefully, and think the verdict in accord with the preponderance of the evidence.

We are of opinion that the judgment of the court below should be affirmed.

MASTER AND SERVANT — DUTY TO INFORM SERVANT OF EXTRA DANGER. — The master must inform his servants of any increased danger or unusual hazard to which he is about to subject them; *Brennan v. Gordon*, 118 N. Y. 489; 16 Am. St. Rep. 775, and note.

WESTERN UNION TELEGRAPH COMPANY v. KIRKPATRICK.

[76 TEXAS, 217.]

TELEGRAPH COMPANY — NOTICE FROM FACE OF MESSAGE. — A telegraph message worded "O. S. Kirkpatrick, Highland Station: Come on first train. Bring Ferdinand. His father very low. Signed, Jerry London," — does not, upon its face, apprise the company that the person addressed had a wife at the place named, or that its object was to afford information upon which she was expected to act, and hence cannot be made the basis of a recovery of damages for her mental suffering caused by delay in its delivery. Nor does the fact that the receiving agent knew the relationship between the parties affect the case, as there is nothing in the message to indicate that it was sent for the wife's benefit, or that she was expected to act upon the information conveyed by it.

TELEGRAPH COMPANY — NOTICE FROM FACE OF MESSAGE. — In telegraph messages conveying information relative to sickness or death, it is only in cases where the language used is sufficient to suggest to the company that a near relationship exists between the party named in the message and the party addressed, and that the object is to afford the latter an opportunity of visiting his relative, that it is sufficient upon its face, without further notice, to render the company liable for damages for mental suffering resulting to him through the negligence of the company in failing to make prompt delivery of the message.

Stemmons and Field, for the appellant.

Wheeler and Rhodes, for the appellee.

GAINES, A. J. This suit was brought by appellee to recover of appellant damages for mental suffering of appellee's wife, alleged to have resulted from a failure to deliver according to contract a telegraphic message. The plaintiff resided with his wife at Highland, and his wife's father was upon his death-

bed in Galveston. Jerry Lordon, a relative of the family, delivered to the agent of the defendant company in Galveston a message for transmission to plaintiff, which read as follows:—

“C. S. KIRKPATRICK, Highland Station.

“Come on first train. Bring Ferdinand. His father very low.

[Signed]

“JERRY LORDON.”

The message was received for transmission between five and six o'clock in the evening, but was not delivered until a quarter before ten o'clock at night. The wife of plaintiff was at his residence at Highland, and it is claimed was prevented, by the delay in the delivery of the message, from being with her father in his last moments. As plaintiff claims, the message was delivered too late to take the evening train to Galveston, and that but for the delay the wife would have taken that train, and would have gone at once to the bedside of her father. After the receipt of the message, she took the next morning train, but arrived in Galveston after her father's death.

In the cases of *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, and of *Western Union Tel. Co. v. Feegles*, 75 Tex. 537, we held that in telegraph messages conveying information of sickness and death, if the language was sufficient to suggest that a near relationship existed between the person mentioned in the message and the person addressed, and that the object of the communication was to afford the latter the opportunity of going to his relative, it would be sufficient, without further notice, to render the company liable for damages for any mental suffering that should result to him from his being deprived of the consolation which his visit would have afforded, provided the negligence of the company in failing to make a prompt delivery was the cause of the injury. That case has been followed at the present term: *Western Union Tel. Co. v. Moore*, 76 Tex. 66; *ante*, p. 25.

It was not the purpose of the court, in the cases cited, to depart from the ruling that in these actions only such damages are recoverable as were in contemplation of the parties at the time the contract was made. We held merely that from the face of the messages in those cases, the company was to be presumed to have contemplated the damages which were claimed to have resulted from the breach of the contract of

delivery. That rule cannot be applied in the case before us. There is nothing upon the face of the message under consideration to apprise the company either that plaintiff had a wife, or that she was at Highland Station, or that the object of the communication was to afford information upon which she was expected to act.

There was no evidence that any extrinsic notice was given to the agent who received the message for transmission, and who made the contract on behalf of the company. In order to surmount the difficulty of a want of notice to the contracting agent of the alleged object of the message, it was alleged, and proof was offered to show, that the agent at Highland was acquainted with the plaintiff and his wife, and knew that the message referred to her father. We need not decide whether or not notice at that end of the line would be sufficient; for should we hold the affirmative of that question, we should still be bound to decide that the facts known to the agent at Highland would not affect the case, because the message does not indicate that it was expected that Mrs. Kirkpatrick should go to Galveston as the result of the information conveyed. There is nothing in the language to show that it was intended for the wife's benefit, or that necessarily suggested this to the agent, although he may have known both the lady and her father. The message suggests only that it was sent for the benefit of the person addressed, and of "Ferdinand," who was shown to be the brother-in-law of the plaintiff, and the agent knew nothing bearing upon the case, except that the plaintiff had a wife, and that the information related to her father.

It follows, from what has been said, that we are of opinion that appellant's assignments of error are well taken. The petition sought expressly to recover for the injury done to the wife only, and failed to show a state of facts from which it could be legally inferred that damages to her feelings were in contemplation of the parties at the time the contract was made. The charges requested which also presented this view of the law of the case should have been given.

For the errors pointed out by the appellant's assignments, the judgment is reversed, and the cause remanded.

THE PRINCIPAL CASE IS DISTINGUISHABLE from *Western Union Tel. Co. v. Moore*, 76 Tex. 68, *ante*, p. 25, the two cases being diametrically opposite as to the facts underlying them. In that case, a sister sent a message to her brother, relating to another brother, who was sick, the message being worded

thus: "Billie is very low; come at once." The appellee therein sued the telegraph company for a failure to deliver the message promptly, claiming damages for his mental anguish and suffering, alleged to have been caused by his failing to arrive at the bedside of his sick brother before his death. Upon the authority of *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, and *Western Union Tel. Co. v. Feebles*, 75 Tex. 537, the court decided that the message was, upon its face, sufficient to put the company upon inquiry as to the relationship of the parties, and the importance of the message, and that damages were properly recoverable for mental anguish resulting from a failure to promptly deliver it.

MALLORY & Co. v. SMITH.

[76 TEXAS, 282.]

WAREHOUSEMEN — DAMAGES FOR INJURY FROM NEGLIGENTLY STORING FREIGHT. — Where a warehouseman receives heavy freight, and stores it in such a negligent manner that the consignee or his agent, while exercising reasonable care, and without negligence, is injured in attempting to remove it, the warehouseman is liable in damages for the injury received.

Willie, Mott, and Ballinger, for the appellants.

L. E. Trezevant, for the appellee.

GAINES, A. J. The appellee brought this suit in the court below to recover of appellant, a corporation, damages for personal injuries, alleged to have been caused by the negligence of its employees.

The undisputed facts, as shown by the testimony adduced upon the trial, are, that the appellant, as a common carrier, transported to the city of Galveston certain boxes of copper, and deposited them in its warehouse for delivery to the consignee. The boxes were each about six feet long, four feet wide, and four or five inches thick, and each weighed five hundred or six hundred pounds. When placed in the warehouse, they were set up perpendicularly, upon their edges. The consignee, being ready to receive the freight, employed the appellee, who was a drayman, to haul it to its destination. Appellee went to the warehouse, and upon his placing his hand upon one of the boxes, or laying hold of it, it immediately toppled over and fell. In its fall, it caught his leg between it and a post, and caused a fracture of the limb. As to the degree of force which was applied to the box, and as to his intention in placing his hand upon it, the evidence was

conflicting. The agent of the consignee accompanied appellee to the warehouse, and was present when the accident occurred.

Appellee testified, in his own behalf, that he did not know the character of the freight to be handled, and that, after entering the warehouse, he merely placed his hand upon the box for the purpose of identifying it, and asked the agent the question, "Is this to go?" and that all the boxes at once fell. Hinckeldey, the agent who employed appellee, testified that he told appellee, at the time of the employment, that the freight to be handled was three heavy boxes of copper, and some other articles. He further testified: "Smith went up to the first box, and as soon as he lifted it, the boxes all came over."

Upon cross-examination, he said: "When he (Smith) saw them, he said he did not believe they were so very heavy, and he went up to one of them, and put his hand on one, and sort of moved it, and it fell over."

There was evidence that it required as many as four men to place one of said boxes on a dray, and that one man should not have attempted to move them without assistance. There was also testimony to the effect that such boxes, when laid flat, were very difficult to handle, and that it was usual to set them upon edge. The stevedore of appellant, who placed the cases in the warehouse, testified that such was the proper and safe way to place them. On the other hand, there was evidence that the only safe manner of placing them upon edge was to lean them against some other object for a support.

The judge, in his charge, first instructed the jury as to what was negligence, both on part of a warehouseman and on part of a drayman, and then proceeded as follows: "If you believe, from the evidence, that the defendants, or their employees, were guilty of negligence in the manner of stacking the boxes of copper, and that such negligence caused an injury to the plaintiff, then the plaintiff would be entitled to a verdict for his damages, unless you believe, from the evidence, that the plaintiff, by his own negligence, contributed to his own injuries. The burden of proof is upon the plaintiff to show that he has been injured by the negligence of the defendant company or its employees. If you believe, from the evidence, that the plaintiff, by his own negligence, contributed to his injuries, the plaintiff cannot recover any damages, even if the defendant company was also guilty of negligence." After

stating the rule as to the measure of damages, the charge then continued as follows: "If you believe, from the evidence, that the plaintiff undertook to handle a box or test its weight alone, and that ordinary prudence would have dictated a different action, and that such action on part of plaintiff was negligence proximately contributing to plaintiff's injuries, the verdict should be for the defendants."

The defendants then asked the court to give the following special instructions, all of which were refused:—

"1. It is the duty of a carrier to safely transport and deliver goods. Carriers by sea perform this duty when they place freight upon the wharf, where the consignee can take the same, and the consignee notified of the same. In this case, it being an undisputed fact that the boxes of copper were placed upon the wharf, and that the consignees, by their agent, Hinckeldey, had assumed control of them, the delivery was complete, and no fault attached to the carrier for non-delivery. The question then remains for you to determine whether the boxes were placed upon the wharf in the usual and customary manner, in a reasonably safe position, and in a position to be easily and readily handled. If you find, from the evidence, that the boxes were placed upon the wharf in a reasonably safe position, in the usual and customary manner for facility in handling, your verdict will be for defendants.

"2. The undisputed facts in this case show that the boxes had been landed on the wharf, that the consignees thereof had been notified and had taken control of them for the purpose of removing them from the wharf, and that the accident occurred while they were being handled by the agent of the consignees and the drayman employed by said agent. This relieves the defendants from liability, and you will therefore find for defendants.

"3. The court charges the jury that the plaintiff cannot recover if his own negligence contributed to the accident, because it is a principle of law that an injured person cannot have damages if his own acts of negligence, omission, or commission aided to bring about the result he complains of. It was the duty of the plaintiff to have used reasonable caution and care to avoid the accident; and if you find, from the evidence, that the plaintiff, either through carelessness, recklessness, overconfidence, or from the omission to perform reasonably cautious and prudent act or acts, contributed to

the accident, he cannot recover, even though the defendants may have been negligent in the first instance.

"4. In delivering freight, the carrier is not an insurer against accidents to other parties. He is only called upon to place freight upon wharves or other landings, in the usual, customary manner, and in a reasonably safe position to be easily handled; and if he does this, he is not responsible to any person who may accidentally be injured from handling said freight."

"6. The burden of proving negligence rests on the party alleging it, and where a person charges negligence on the part of another as a cause of action, he must prove the negligence by a preponderance of evidence.

"7. If you believe, from the evidence, that the plaintiff undertook to handle or test the weight of the boxes of copper alone, and that ordinary prudence would have dictated that more than one man should have been used for such purpose, and that such action on the part of plaintiff proximately contributed to the injury, then you will find for the defendants."

The refusal to give each of these instructions is made the subject of a separate assignment of error. The charges, as propositions of law, with the exception of the second, are correct; but so far as they were applicable to any phase of the case, we think they were substantially given in the main charge. So much of the first instruction as related to the duty of common carriers was not applicable to any issue presented by the pleading or the evidence. The defendants were not charged with liability growing out of the neglect of any duty as a common carrier. The same may be said of the fourth. The charge given upon the burden of the proof and that upon contributory negligence were all that could reasonably be required; therefore the court did not err in refusing the third, sixth, and seventh requests. The second charge requested is erroneous, and was also properly refused. It would have absolved the defendants from any liability, although the boxes may have been stored in the warehouse in such a negligent manner that they were likely to inflict injury upon any one who was called upon to move them, however careful such person may have been in making the attempt.

There are several assignments of error which relate to the ruling of the court in refusing to grant the motion for a new trial. They are substantially based on two propositions: 1.

That the evidence failed to show negligence on part of the defendants' employees; and 2. That it did show negligence on part of the plaintiff, contributing to the injury. We do not assent to either proposition. We think that a box of the weight and dimensions of that which caused the injury in this case is dangerous to any one who may come in contact with it when it is set upon its edge without any lateral support. The jury were certainly authorized to infer this from the testimony in the case. They were authorized, too, to find that the danger could have been easily and conveniently obviated by placing the box upon its edge, and resting it in an inclined position upon some other object. Such being the case, it was negligent to leave them without support. Nor is the verdict without evidence to support it on the issue of contributory negligence. Even disregarding his own testimony, we think the jury may have been justified in concluding that he was not negligent in attempting to move or to test the weight of the boxes. It appears, from the evidence, that freight of the dimensions and weight of these cases was rather unusual; and it does not appear that plaintiff had had any experience in handling boxes of copper of such size and shape.

While we think the testimony leaves no doubt that the boxes as placed upon edge were unsafe, we cannot say that the danger was so obvious to a person inexperienced in handling packages of a like character as to require the jury to find that it was negligent in plaintiff to attempt to remove them. The jury, however, may have found that he did not make such attempt, but that he merely placed his hand on the box for the purpose of identity.

There is an assignment of error which complains of the refusal of the court to admit certain testimony, but the exception by which it was sought to reserve the question appears only in the statement of facts, which was filed after the adjournment of the term; therefore it cannot be considered.

We find no error in the judgment, and it is affirmed.

NEGLIGENCE. — The owner of premises is liable in damages to one who, using due care, comes thereon at the invitation or inducement, express or implied, of such owner, on any business to be transacted with or permitted by him, for injuries occasioned by the unsafe condition of the premises suffered by the owner negligently to exist: *Donaldson v. Wilson*, 60 Mich. 36; 1 Am. St. Rep. 487, and cases cited in note 489, 490.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. LEVL.

[76 TEXAS, 337.]

COMMON CARRIER CANNOT EXCUSE HIMSELF FOR FAILURE TO CARRY and deliver because prevented by human agency not under his control, without fault on his part; but if property is wholly lost or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure to safely carry and deliver.

COMMON CARRIERS—DELAY CAUSED BY STRIKES OR MOBS.—A common carrier is not liable for loss or damage naturally resulting from delay in delivering freight, caused by mobs or a strike of employees, accompanied by intimidation and violence which could not be prevented or suppressed by the carrier or the civil authorities. All that is required of the carrier in such case is, that he shall exercise due care and diligence to guard against the delay, and omit no reasonable effort to secure the safety of the property.

Shepard and Miller, for the appellant.

B. P. Ayres, for the appellee.

STAYTON, C. J. A further consideration of this case induces us to believe that the former disposition made of it was erroneous, and the motion for rehearing is sustained.

Appellee brought this action to recover damages resulting from delay in transporting a car-load of lemons, received by appellant from another railway company at Rosenberg Junction, to be transported to Fort Worth.

He alleged if the lemons had been transported within a reasonable time they would have reached Fort Worth on September 27th, at which time they were then worth in the market twelve dollars per box, but that they were not delivered at Fort Worth until October 2d, when they were worth in the market only four dollars per box, and that by reason of this delay he was damaged two thousand dollars, there being 250 boxes.

He further alleged that the lemons were shipped from New Orleans in a ventilated car, as was necessary for their preservation, but that while *en route* they were transferred from that to a close car, whereby they were caused to heat and rot, and that from this cause fifty boxes were lost, for which he asked six hundred dollars as damages.

He further alleged that he was compelled to assort the lemons after they were received at Fort Worth, which cost him fifty cents per box, and this he also sought to recover.

The petition then proceeds as follows: "Wherefore plaintiff avers and charges that by reason of said unreasonable delay

in the transportation and delivery of said lemons as aforesaid, and the depreciation of the price thereof as aforesaid, and the transferring said lemons from said ventilated car to said close car as aforesaid, he has been damaged in the sum of \$2,725," for which he prays judgment.

Defendant answered by a general denial, and further specially pleaded as follows:—

"And for further and special answer, the defendant says that if it ever received the fruit described in plaintiff's petition, the same was received by it at Rosenberg Junction, from the Galveston, Harrisburg, and San Antonio Railway Company, and was immediately forwarded from said station in said car in which the same had been delivered to defendant, without opening the same; that the said car-load of fruit was carried with speed and safety to the city of Temple, in Bell County, through which it had to pass to be delivered to plaintiff at Forth Worth; that said car on its arrival at Temple was taken from the train and side-tracked by a mob of persons who at the time were engaged in a riot in the said city of Temple, and in the removal and destruction of defendant's property, including its road-bed, rolling stock, freight, etc., at said place; that said rioters were in great force and number, and that it was impossible for defendant, with its agents and employees, to resist them or dispossess them of defendant's property; that when the plaintiff's fruit arrived at Temple in the said car, the said rioters immediately stopped the train and car bearing the said fruit, and took possession thereof and out of the control of defendant, with overpowering force and arms, and against its protest, and notwithstanding its strenuous and exhausting efforts to prevent the same; that said rioters uncoupled the cars and forced said car of fruit upon a side-track, where by overwhelming force and arms and violence, for the space of, to wit, five days, they held possession of the same, refusing to permit the defendant to remove the same, and using force and violence to prevent defendant and its agents and employees from moving said car, as it then offered and wished and was ready to do.

"Defendant says that it had remaining in its employ, at and during said time, a sufficient number of competent employees, who would have moved its trains, and carried said car of fruit and other freight, had it not been prevented by the force and violence herein charged. Defendant made every possible effort to resume control of its property, and to move

its said trains, and ship the car bearing plaintiff's fruit, and through its manager and agents, appealed to city, county, and state authorities and officers for assistance and force to control said riot and the prevailing unlawful force, and to assist defendant to repossess itself of its property, and to pursue its lawful business. But defendant says that neither the city, county, nor state officers and authorities were able to furnish sufficient force to subdue said riot and dispossess said rioters, and drive them from the occupation of defendant's property; that this state of affairs existed for the space of, to wit, five days, during which the plaintiff's fruit was in the control and in the possession of said rioters, and could not be handled or transported by defendant; that immediately after the cessation of said riot and the dispersion of said rioters, which occurred at the end of, to wit, five days, the defendant immediately recovered its property and freight, and took possession of said car, and, as soon as it was possible, transported the same to its destination, namely, the city of Fort Worth, in Tarrant County, where it delivered the same at once to plaintiff. Wherefore defendant says that it has not been guilty of any negligence in and about said transportation of said car, and said delay was not due to the negligence of its duties by defendant, but solely and wholly and entirely to the act of the said rioters and unlawful persons, and to the inability of the peace-officers of the city of Temple and county of Bell and state of Texas to disperse the said rioters, and restrain them from acts of violence, and permit the defendant to pursue its ordinary and peaceful avocation. And all this the defendant is ready to verify, and prays judgment."

The plaintiff filed a general demurrer to this plea, as setting up no lawful defense, which was sustained by the court.

There was a judgment for the plaintiff, from which this appeal is prosecuted. From the statement, it will be seen that plaintiff based his claim for damages mainly on the ground that there was an unreasonable delay in the transportation of the lemons.

If a defense to a claim for damages resulting from such a cause, other than inevitable accident or the act of God, can prevail, there can be no doubt that the answer sets up such a defense; and if a good defense to any part of plaintiff's claim was set up in the answer, it was error to sustain a demurrer to it.

Under the statutes of this state, the liability of the common

carrier is that imposed by the rules of the common law. "He is liable not only for losses occasioned by secret theft or embezzlement, but for those inflicted by highway robbery, by the spoliation and outrages of mobs, rioters, and insurgents. The most resistless conflagration, if occasioned by human agency, without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption": *Chevalier v. Straham*, 2 Tex. 123; 47 Am. Dec. 639.

For failure to carry and deliver, the carrier cannot excuse himself by reason of the fact that, through human agency not under his control, this was prevented without fault on his part; but if the property be wholly lost or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure safely to carry and deliver; for the operation of the laws of nature working destruction or loss furnish the same excuse as do tempest, lightning, or other cause termed the act of God.

The reasons on which the common-law rule is based are thus stated by two English judges, whose knowledge of the groundwork of that system has never been questioned:—

In *Forward v. Pittard*, 1 Term Rep. 27, the reasons are thus stated by Lord Mansfield: "But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows that it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests. If an armed force come to rob the carrier of the goods, he is liable; and a reason is given in the books, which is a bad one, viz., that he ought to have a sufficient force to repel it; but that would be impossible in some cases, as, for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil."

The reasons are thus stated by Best, C. J., in *Railey v. Horne*, 5 Bing. 550: "When goods are delivered to a carrier they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to their place of destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not

be contradicted, would excuse their masters and themselves. To give due security to the property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward — namely, that of taking all reasonable care of it — the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country when they happen that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God and the king's enemies."

The same reasons do not apply when the thing is actually transported and delivered, although when delivered it may be greatly diminished in value by a fall in the market price, or its value partially or entirely destroyed by reason of its inherent perishable nature which has worked its partial or entire destruction while in transit.

The rule is thus stated by a recent text-writer, in accordance with the views expressed by many others: "But the reasons upon which the extraordinary responsibility of the common carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement, or theft by collusion and fraud on his part, has no application when the mere time of the carriage is concerned. 'His first duty,' it is said, 'is to carry the goods safely, and the second, to deliver them; and it would be very hard to oblige the carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. His duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver, as Tindal, C. J., puts it when he says, "the duty to deliver within a reasonable time being merely a term ingrafted by legal implication upon the promise or duty to deliver generally." In this respect, therefore, the common carrier stands upon the same ground with other bailees, and may excuse delay in delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God. All that can be required of him in such an emergency is, that he shall exercise due care and diligence to guard against the delay, and that if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods'": Hutchinson on Carriers, sec. 330. See also secs. 292, 331-335.

Many cases are cited in the notes illustrative of the appli-

cation of this rule, and we will briefly refer to some more recent.

In *Hass v. Railroad Company*, 35 Am. & Eng. R'y Cas. 572, it was held that the company was not liable for loss resulting from delay in delivering freight, caused by a strike of its employees, accompanied by intimidation and violence which could not be prevented or suppressed by the company or civil authorities. The loss in that case resulted from a fall in the market price between the time the freight would ordinarily have been delivered but for the obstruction and the time when it was delivered.

In the case of *Geisner v. Lake Shore etc. R'y Co.*, 102 N. Y. 563, 55 Am. Rep. 837, the same ruling was made, and the case distinguished from *Weed v. Panama R. R. Co.*, 17 N. Y. 362; 72 Am. Dec. 474; and *Blackstock v. New York etc. R. R. Co.*, 20 N. Y. 48; 75 Am. Dec. 872. Case last cited, while affirming the rule quoted from *Hutchinson on Carriers*, held that the simple fact that employees refused to work did not relieve the carrier from liability for failure to transport freight within the usual time.

Pittsburgh etc. R'y Co. v. Hollowell, 65 Ind. 189, 32 Am. Rep. 63, was a case in which the carrier was sought to be held liable for failure to receive and transport freight within the usual time, and the company set up a defense similar to that urged in the case before us. After stating the rule as to the liability of carrier for failure to deliver at place of destination, the court said: "But this strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract or of his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves or robbers, or an uncontrollable mob."

In *Pittsburgh etc. R. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422, it was held competent for the carrier to show, in a suit for damages resulting from delay in the transit of freight, that the delay was caused solely by irresistible violence of men whe

were not in the employment of the company, and that when employees suddenly refused to work, and were discharged and others employed, who were prevented, by lawless violence of those discharged, from doing duty, the company was not liable for delay thus caused.

The case of *Lake Shore etc. R'y Co. v. Bennett*, 89 Ind. 457, approves the rule asserted in *Pittsburgh etc. R'y Co. v. Hollowell*, 65 Ind. 189, 32 Am. Rep. 63, though the case was one under contract.

Many cases might be cited in which carriers have been held not liable for injury resulting solely from delay, when this was shown to have been caused by misfortune or accident, not such as would relieve the carrier for loss of freight or failure to deliver it.

We are of opinion that the answer excluded presented a good defense to so much of the action as sought to recover damages for decline in market price of lemons during time of transit.

It may be true that the answer does not present a defense arising from the fact that the lemons may have become less valuable while in transit, by reason of natural decay, without fault on part of carrier; for there is no averment in the pleadings of either party that there was any diminution in value on that account.

Plaintiff does allege that they heated, and on that account rotted to a given extent, but that was attributed to the wrongful act of defendant in putting them in an improper car. To the extent the fruit may have deteriorated on account of its perishing nature while in transit, the facts pleaded would furnish a defense, if defendant bestowed upon it proper care; for in such case such a loss would be attributed solely to the decay, which the answer excuses.

For the error of the court in sustaining the demurrer, the judgment will be reversed, and the cause remanded.

CARRIERS OF GOODS. — A carrier's liability for the loss of goods, or deterioration thereof, by reason of a delay caused by riots, strikes, or mobs, is discussed in note to *Norris v. Savannah etc. R'y Co.*, 11 Am. St. Rep. 365, 366.

COOK v. HOUSTON DIRECT NAVIGATION COMPANY.

[76 TEXAS, 253.]

PLEADING — SUFFICIENCY OF ANSWER. — Where the petition in an action against a company owning and operating a freight tug-boat alleges that such company was a carrier of passengers, and that plaintiffs' child was killed while a passenger on such boat, an answer alleging that the boat was not a passenger-boat, and that the employees of the company were forbidden to carry any one as a passenger without a special permit, which was not in this case obtained, is sufficient.

MASTER AND SERVANT — LIABILITY FOR UNAUTHORIZED ACT OF EMPLOYEE.

— The employees of a company operating a freight-boat, who are expressly forbidden to carry passengers upon it, have no authority to bind the company by contract to carry passengers.

NEGLIGENCE TOWARD MINOR. — It is negligence in the owner of a tug-boat to permit a minor child to be aboard, where there is danger of its being drowned, without taking adequate precautions to avoid all accidents.

MASTER AND SERVANT — LIABILITY FOR UNAUTHORIZED ACT OF EMPLOYEE.

— Where a minor child is drowned through having been invited aboard a tug-boat by the servants of the owner, which act was outside their authority, and against express orders, no recovery can be had, if the right of action is made to depend upon the invitation of the owner.

MASTER AND SERVANT — LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT.

— Where the master of a tug-boat leaves the control and management, for a time, to his servants on board, the owner will be liable for their negligent act in allowing a minor child on the boat, and in a place of danger, although such act was contrary to the express orders of the owner.

CONTRIBUTORY NEGLIGENCE OF MINOR QUESTION FOR JURY. — The question of contributory negligence, capacity, intelligence, and discretion in a minor between thirteen and fourteen years of age should be left to the jury.

B. O'Malley, Gustave Cook, and A. C. Allen, for the appellants.

W. N. Shaw, for the appellee.

GAINES, A. J. This action was brought by appellants to recover of appellee, a corporation, damages for the death of their daughter, Rosa Cook, which was alleged to have been caused by the negligence of the defendant company.

The plaintiffs resided in the city of Houston, near a wharf, at which a tug-boat belonging to the defendant company was accustomed to lie. Rosa, who at the time of her death was thirteen years and nine months old, had been in the habit of carrying milk from her parents' residence to the boat, for the use of the captain. On the day of her death, she went, about noon, to the boat, upon the same errand, and the employees of the boat, being at dinner, invited her on board to dine. Her

little brother, who happened to be passing near the boat at the time, was also asked to come on board to take dinner. While they were dining, the boat was cut loose from the wharf and moved down the stream, and while it was in motion Rosa was called by one of the crew to take coffee. In passing along the side of the boat she came close to a pile of wood, and placing her hand upon it, one or more billets fell and struck her upon the knee and precipitated her into the river, when she was drowned.

It was first alleged, in the petition, that the defendant company was a common carrier of freight and passengers; that plaintiffs' daughter, Rosa, was taken on board the tug-boat as a passenger, and that her life was lost while that relation existed between her and the defendant. But it was also alleged that she was received upon the boat against the will of the plaintiffs, as known to the defendant company, and that under such circumstance it was an act of negligence.

The defendant filed an answer, in which, among other things, it was alleged that the boat upon which the accident occurred was not a passenger-boat, but merely a steam-tug, engaged in the towing of barges and lighters owned by the company, and that the employees of the company were forbidden to convey any one as a passenger upon the boat without a special pass from the general superintendent of the company; and that if plaintiffs' daughter was taken as a passenger upon said boat, which was not admitted, but denied, she was so received contrary to the rules and regulations of the company. So much of the answer as alleged these facts was excepted to, and the exceptions were overruled.

Appellants' first four assignments of error complain of the ruling of the court in not sustaining the exceptions. We are of the opinion that the allegations excepted to were a sufficient answer to so much of the petition as alleged that at the time of the accident the relation of passenger and common carrier existed between the daughter and the defendant. The petition having based the cause of action upon two grounds, an answer to either was an answer to so much of the petition, and was properly permitted to stand.

Upon the trial, the defendant offered testimony to prove that the steam-tug was not a passenger-boat; that it was against the rules of the company for the employees to carry passengers upon it without a special permit, and that, as a matter of fact, no one was allowed to be carried upon it without such

permit. The evidence was admitted over the objection of plaintiffs, and in its admission there was no error. It is the privilege of any person or company operating water-craft to become a carrier of passengers, or not, as he or they may see fit. It takes a contract, either express or implied, to establish the relation of carrier and passenger, and we do not see that the employees of a company operating a freight-boat, who are expressly forbidden to carry passengers upon it, have any authority to bind the company by such a contract. It is entirely out of the scope of their employment.

Cases may be found in which railroad companies have been held bound by the act of conductors of freight trains in taking persons as passengers, although this was prohibited by the regulations of the company. We presume, however, that in such cases it has generally appeared that the conductors had been permitted to make a practice of carrying passengers, notwithstanding the rule. We think it was competent in this case for the defendant to show that the boat was but a tug, and not a passenger-boat; that its employees were forbidden to carry passengers, and that passengers had never been carried upon it with the consent of the company's representatives. The evidence tended to destroy so much of the plaintiffs' testimony as was offered to show that Rosa was a passenger.

The other assignments of error complain of the charge of the court. They are thirteen in number, and all the objections to the charge might have been presented under one assignment alone. Therefore they need not be considered in detail. The court charged the jury, in substance, that unless they found that plaintiffs' daughter was a passenger in defendant's boat they could not recover. In this we think there was error. There is no pretense of any express contract of carriage, and we see nothing in the testimony from which such contract should have been implied. It may therefore be doubted whether it would have been error if the court had charged that the plaintiffs had no cause of action growing out of the relation of carrier and passenger. But this was not the sole ground upon which a recovery was sought. As before stated, the petition also alleged that the company was guilty of negligence in receiving the child on board the boat without the consent of her parents. Although the defendant company may have owed the deceased no duty as a passenger, it does not follow that they are not responsible for her death. Every

person using dangerous machinery is under obligation to operate it in a careful manner. He may owe no duty to one who has attained the years of discretion, and who voluntarily comes in contact with it, to guard him against dangers that are apparent. But as to children the rule is different: *Evan-sich v. G. C., & S. F. R'y Co.*, 57 Tex. 123, 126; 44 Am. Rep. 586. Not being capable of exercising that degree of circumspection in the face of danger that adults are expected to use, a higher degree of care must be exercised towards them. If it be negligent to leave dangerous machinery in a place where children are likely to tamper with it, without taking precautions to prevent them from injuring themselves, we think it equally negligent to permit them aboard a tug-boat, where there is danger of their being drowned, without taking adequate precautions to avoid all accidents.

The facts of the present case, however, suggest some further questions for consideration. There was testimony that an officer of the defendant company had expressly ordered that the children of plaintiff should not be allowed to come upon the boat; and it appears that they were upon board at the time of the accident by invitation of some of the crew, but without the knowledge of either the captain, who was absent at the time, or of the pilot, who was in charge. The act of inviting them on board was not within the scope of the authority of the company's servants, and if the right of action depended upon the invitation, the company should not be held liable. But we think it was the duty of the company not to permit them on board if their presence there was dangerous.

When the company left the management of the boat to its servants, the duty devolved upon them, and it cannot be permitted to say that their action in allowing the children on the boat was contrary to orders, and that it was not liable. A master is liable for the wrongful acts of his servant done within the scope of his authority, although they be done in disobedience of express orders.

We have thus far discussed this case upon the theory that the deceased daughter had not attained years of discretion. We do not wish to be understood as holding this as a matter of law. In regard to a child of very tender years, it would be the duty of the court to declare that it could not be held in any manner accountable for its conduct. On the other hand, it has been laid down "that at fourteen an infant is presumed

to have sufficient capacity and understanding to be sensible of danger, and to have power to avoid it; and this presumption ought to stand, until it is overthrown by clear proof of the absence of such discretion and intelligence as is usual with infants of fourteen years of age": *Nagle v. Allegheny etc. R. R. Co.*, 88 Pa. St. 35; 32 Am. Rep. 413.

Without any disposition to affirm this doctrine, we need only say we are not called upon to deny it. Whether any arbitrary presumption should be indulged as to capacity at the age of fourteen, in civil cases, we are not prepared to say. We think, however, that when the age of the minor is between thirteen and fourteen the question of capacity and intelligence should be left for the determination of the jury. Whether Rosa Cook, at the time she boarded the tug, had the intelligence to appreciate the dangers of the situation, and the discretion and circumspection to avoid them, as ordinary adult persons have, will be a question to be determined. If she had, then the plaintiffs cannot recover.

But should this question be determined in the negative, the right of recovery will still depend upon the further question whether she was guilty of contributory negligence, or not. If, considering her age and discretion, her act in going near the gunwale of the boat and placing her hand upon a pile of wood was such as a similar person of ordinary prudence would not have done, she was guilty of such negligence as would preclude a recovery.

The plaintiffs testified that they forbade the captain to receive the children on board the boat. On the other hand, he testified that he told them not to permit the children to come on board, and that they answered that there was no danger. Should it be found, upon another trial, that they consented for their daughter to go on board on the day she was drowned, they should not recover.

The judgment is reversed, and the cause remanded.

NEGLIGENCE—CONTRIBUTORY—CHILDREN.—The question of the capacity of children between the ages of seven and fourteen to take care of themselves, and failing to do so to be guilty of contributory negligence, is for the jury to determine, under all the circumstances of the case: *Westbrook v. Mobile etc. R. R. Co.*, 66 Miss. 560; 14 Am. St. Rep. 537, and particularly note 590-596.

MASTER AND SERVANT—LIABILITY OF MASTER FOR ACTS OF SERVANT.—The master is not answerable for the act of his servant when doing something which the servant was not authorized to do, and not within the scope of his authority: *Morris v. Brown*, 111 N. Y. 318; 7 Am. St. Rep. 751, and

note. Thus a railroad company is not liable for injuries sustained by one who rides upon an engine at the request of the engineer, it being outside of the engineer's authority to allow persons to ride upon the engine: *Chicago etc. Ry Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380.

CARRIERS — PASSENGERS — FREIGHT TRAINS. — As to the rights of passengers riding upon freight trains with the consent of or upon the invitation of the company's employees, see *New York etc. Ry Co. v. Doane*, 115 Ind. 436; 7 Am. St. Rep. 451, and note.

CITY OF HOUSTON v. JANKOWSKIE.

[76 TEXAS, 368.]

STATUTE OF LIMITATIONS — NEW PROMISE, WHEN INSUFFICIENT. — An annual statement made by the secretary of a municipality to the city council recognising as valid bonds against the city which on their face are barred by the statute of limitations will not remove the bar of the statute, in the absence of evidence that the secretary had authority to make any acknowledgment or promise that would bind the city, or that the city council approved the statement, or in any way acknowledged the existence of the debt.

STATUTE OF LIMITATIONS — NEW PROMISE. — An acknowledgment from which a new promise is to be implied which will remove the bar of the statute of limitations must be made by the debtor in writing, or by some person authorized to make it, and it must be made to the person holding the claim, or to some person acting for him. A promise or acknowledgment made to a stranger is not sufficient.

STATUTE OF LIMITATIONS — NEW PROMISE, WHEN NOT SUFFICIENT. — The levy and collection of taxes by a city to meet interest due and create a sinking fund is not an acknowledgment of or new promise to pay any particular bond or issue of bonds which from their face are barred by the statute of limitations.

H. F. Ring, for the appellant.

J. W. Walker, for the appellee.

STAYTON, C. J. Appellee brought this action against appellant to recover a sum claimed to be due on bonds issued by the latter, which matured on November 1, 1879.

The action was not brought until November 23, 1888, and defendant pleaded in bar the statutes of limitation.

For the purpose of avoiding the bar of the statutes of limitation, the plaintiff introduced in evidence the annual statements of the secretary of the city of Houston for the year 1885, in which the following item appears under the head of liabilities: "M. Richmond, past due bonds, two thousand six hundred dollars." It was admitted that the bonds on which suit was brought were a portion of the two thousand six hundred

dollars' worth of bonds described in the annual statement as "M. Richmond, past due bonds." Plaintiff also introduced the ordinance prescribing the taxes and licenses to be assessed and collected by the city of Houston for the year 1881, and each year thereafter, and it was admitted that the taxes collected by virtue of this ordinance were applied for the purposes mentioned in the same, including the payment of the city debt.

The ordinance referred to levied a tax of one per cent annually on property within the city limits, which, "when collected, shall constitute a fund to be set apart and held for the payment of the interest on the various issues of city bonds heretofore issued under and by virtue of the ordinances and resolutions of this and former city councils, in the order as may be lawfully determined, and also for the creation of a sinking fund for the redemption of the said bonds."

The court below held that these facts took the claim out of the bar of the statute, and entered judgment for principal and interest as they appeared from the bonds. It is claimed that this was error.

In an amended petition filed on April 24, 1889, it was averred "that all of said bonds have been recognized, and the justice of the same has been acknowledged in writing, and signed by the proper and legal officers of the said defendant, within the last four years." If it be conceded that this action is based on a new promise or acknowledgment from which a promise may be implied, do the facts proved constitute such acknowledgment or promise?

The full entry in the annual statement made by the secretary having any bearing on the question before us is under the heading "Bonded Debt. . . . M. Richmond, past due bonds, \$2,600," and under the heading "Approximate Estimate of Accrued Interest on Bonds. . . . for \$2,600, Richmond bonds, six years at ten per cent, \$1,560."

This statement was no doubt made for the information of the city council, but there is no evidence that the secretary had any authority to make any acknowledgment or promise that would bind the city; nor is there any evidence that the city council approved it, or in any way acknowledged the existence of the debt.

The declarations of the secretary, at most, show that, in his opinion, bonds issued to M. Richmond for \$2,600 were past due, and that interest on them to time report was made

amounted to \$1,560; but the city cannot be bound by his opinions, even if expressed to the creditor; and when only contained in report to city council, they are wanting in all the elements necessary to an acknowledgment or promise by which the city can be bound. An acknowledgment from which a promise is to be implied must be made by the debtor in writing, or by some person authorized to make it, and it must be made to the person holding the claim, or to some person acting for him.

No acknowledgment of a debt not made to some person will interrupt the running of the statute, and a statement made by an agent to his principal cannot operate as an acknowledgment.

It has been held that acknowledgments in writing, signed by the debtor, but never delivered to the creditor, or to any one for him, cannot interrupt the running of the statute, or remove the bar completed by lapse of time: *Allen v. Collier*, 70 Mo. 138; 35 Am. Rep. 416; *Merriam v. Leonard*, 6 Cush. 153.

A promise or acknowledgment made to a stranger is not sufficient: *Fort Scott v. Hickman*, 112 U. S. 150; *McKinney v. Snyder*, 78 Pa. St. 497; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Kirby v. Mills*, 78 N. C. 124; 24 Am. Rep. 460; *Parker v. Shuford*, 76 N. C. 219; *Carroll v. Forsyth*, 69 Ill. 127; *Albee v. Wachter*, 74 Ill. 174; *Ringo v. Brooks*, 26 Ark. 543.

In *Fort Scott v. Hickman*, 112 U. S. 150, it appeared that a committee of a city council appointed to consider the city indebtedness made a report showing the assets and liabilities of the city, which included as a liability a named issue of bonds. The report proposed a plan for compromise with holders of city bonds, proposition to holders to be made through circular which the committee recommended, which was to be sent to persons holding city bonds other than the named issue, as to which the committee made no report further than to include them in statement of liabilities. The city council adopted the report of committee, and ordered the circular to be sent to holders of bonds other than the issue named, which was done.

On this state of facts, it was held that neither the report of committee, its adoption, nor the circular or letter was such acknowledgment of the debt evidenced by the named issue of bonds as to take them out of the bar of the statutes of limitation.

Acknowledgment of a debt, such as will justify the raising of an implied promise to pay it, certainly ought to be made to the other party to the contract to be implied, or to some person representing him. The mere fact that the city levied and collected taxes to meet interest due and create a sinking fund cannot operate as an acknowledgment of or promise to pay any particular bond or issue of bonds.

No fact is shown by the evidence which defeats the bar of the statute pleaded, and as the cause was tried without a jury, the judgment will be reversed, and here rendered in favor of appellant.

It is so ordered.

LIMITATIONS OF ACTIONS — NEW PROMISE. — An acknowledgment, to take a debt out of the statute of limitations, must be made to the debtor himself, or to some one acting for him: *Hargis v. Sewell*, 87 Ky. 64. And a mere acknowledgment of the debt to a stranger will not be sufficient: *Parker v. Remington*, 15 R. I. 300; 2 Am. St. Rep. 897; *In re Kendrick*, 107 N. Y. 104.

TEXAS PACIFIC RAILWAY COMPANY v. JOHNSON.

[78 TEXAS, 421.]

RECEIVER OF RAILWAY — LIABILITY FOR ACTS OF. — Although charged with a duty to the public which must be discharged through the use of its property, still, in the absence of a statute so providing, a railway company is not liable for the acts of a receiver having charge of its property by reason alone of his relation to it.

RECEIVER OF RAILWAY — LIABILITY FOR ACTS OF, WHEN COLLUSIVELY APPOINTED. — Where a receiver is appointed for a railway company, through collusion with it and a portion of its creditors, for the purpose of placing, for a time, its property beyond the reach of another class of its creditors, it is liable for his acts while in control of the property.

RECEIVER OF RAILWAY — LIABILITY FOR ACT OF, WHEN ACTING WITHOUT JURISDICTION. — Where a railway company permits its property to remain in the hands of a receiver appointed by a court having no jurisdiction over its property, it is liable for his acts while in control of the property.

RECEIVER OF RAILWAY — LIABILITY FOR NEGLIGENT ACTS OF. — A claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating the road is entitled to payment out of the current receipts.

RECEIVER OF RAILWAY — LIABILITY FOR CLAIM WHICH RECEIVER SHOULD HAVE PAID. — Where the earnings of a railway in the hands of a receiver are invested in betterments, which, without sale, are returned to the company, with its other property, at the close of the receivership, the company is liable for the satisfaction of any claim which the receiver ought to have paid out of the earnings.

RECEIVER OF RAILWAY — EFFECT OF DISCHARGE OF — ORDER OUTSIDE OF JURISDICTION. — The discharge of a receiver by the court appointing him, and the return of the property to the owner, ends the jurisdiction of the court, and it has no right, in the decree of discharge, to order that the property shall be relieved from liability for claims not established by intervention in that court within a time shorter than that fixed by law, so as to affect such owner's liability for injuries arising from the receiver's negligence, especially where the owner has received in improvements earnings out of which the injured party is entitled to have his damages paid, although his claim is not established by intervention within the time fixed by the order of court.

RECEIVER OF RAILWAY — EFFECT OF DISCHARGE OF, ON CLAIMS AGAINST THE PROPERTY. — The discharge of the receiver, and return of the property to the owner, leaves the property subject to any claim or charge legally resting upon it; and this may be enforced, through appropriate process, by any court having jurisdiction.

RECEIVER OF RAILWAY — ESTABLISHMENT OF CLAIM AGAINST PROPERTY AFTER DISCHARGE — VOID ORDER. — When at the time a receiver is discharged, and the property returned to the owner, there is a valid claim existing against it, the time within which such claim must be established cannot be arbitrarily fixed by order of the court granting the discharge. Such time is fixed by statute, except in cases where, from long lapse of time, equity is authorized to refuse to enforce the claim.

RECEIVER OF RAILWAY — LIABILITY FOR NEGLIGENCE. — A receiver having control of a railway is liable for injuries received by an engineer who, without fault on his part, is injured through the negligence of the receiver in using defective appliances on the road.

RECEIVER OF RAILROAD — VERDICT AGAINST, FOR NEGLIGENCE NOT EXCESSIVE. — A verdict of fifteen thousand dollars against a receiver controlling a railway, for injuries to an engineer in his employ, and arising from his negligence, is not excessive, where the engineer is in the prime of life, earning from \$165 to \$195 per month, and is injured permanently, so as to be incapacitated to perform any useful or profitable labor, and rendered deaf.

F. H. Prendergast, for the appellant.

C. A. Culberson, for the appellee.

STAYTON, C. J. From December 16, 1885, until October 31, 1888, the Texas Pacific Railway was in the hands of and operated by John C. Brown as receiver, appointed by the circuit court of the United States sitting in the eastern district of Louisiana.

Appellee brought this action against the receiver on September 14, 1888, to recover damages for an injury alleged to have been received by him, through the negligence of the receiver, on January 31, 1888. Being advised that the receiver had been discharged, on December 17, 1888, appellee caused the railway company to be made a defendant.

There was a trial, which resulted in a judgment in favor of

the receiver, but the appellee recovered a judgment against appellant for fifteen thousand dollars.

The Texas Pacific Railway Company answered that the road was in the exclusive management and control of John C. Brown as receiver, appointed by the United States circuit court for the eastern district of Louisiana, at the time plaintiff was injured; that when the receiver was discharged the property was turned over to defendant, by virtue of a decree of the court that appointed the receiver, and by said decree the property was made liable only,— 1. For all traffic liabilities due connecting lines; 2. For all contracts made by the receiver; 3. For all judgments which may be rendered in favor of persons interested in the cause, where the receiver was appointed before February 1, 1889, and free from all other demands or claims; and that the cause should be dismissed. Defendant further answered that plaintiff assumed the risk of the injury he received.

The record shows that on or before May 16, 1888, the receiver made known to the court that appointed him that the objects and purposes contemplated in the several proceedings under which he was appointed had been practically accomplished; that the parties in interest so agreed; and after settlement with him, and the payment of costs and other liabilities or provision therefor made, that he should be discharged, and the causes dismissed.

The agreements of the several parties to this effect are stated to have been made exhibits to receiver's petition for discharge, which stated that his accounts to the 1st of May were in condition for settlement, which he asked.

He further stated that he had an agreement with the reorganization committee as to his compensation, and prayed that he be permitted to "turn over to the proper officer of the Texas Pacific Railway Company" the property in his hands, but made known to the court that there were unsettled claims growing out of his conduct of the business, against which he asked protection.

On May 16, 1888, the petition was acted upon by the court, which, after directing a settlement to June 1st, stated that "in the mean time the receiver will continue to hold the property under the orders of the court until the 1st of June, 1888, at which time, if this order is not vacated, the railway and its property may be operated by the corporation, under such orders as may be made by the court from time to time, and

under the supervision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court, nor of the receiver, until the accounting takes place with the receiver, and until he is fully protected by the corporation for causes of action originating against him and against the property pending the receivership."

On or before October 26, 1888, the receiver, reciting the former orders, and stating that his accounts had been examined and approved, stated that "no formal delivery of the road and property in his hands had been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the 1st of June, and for all receipts and expenditures by him received and made since the 1st of June. He has carried over to the present books of the company the cash balance, and all other balances of property and assets as found in his hands by his report to the 1st of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all said company's road, property, and funds, as such, for said company; wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable; but he asks the court to make such orders as will charge the property so turned over in the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable."

He further stated that his compensation had been agreed upon and settled to the 31st of October, "at which time he asks that his discharge take effect."

This petition was acted upon by the court on October 26, 1888, when the following order was entered: "On consideration of the foregoing petition, it is now ordered, adjudged, and decreed that the prayer of the same be granted; and accordingly, that John C. Brown, receiver of the property of the Texas Pacific railway in the above-entitled causes be and he is hereby directed to make delivery unto said Texas Pacific Railway Company of all property, funds, and assets in his hands as such receiver; and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the said 1st of June, 1888. Such

delivery will be made as of October 31, 1888. It is further ordered that said receiver be finally discharged on said 31st of October, 1888, from his receivership, on payment of all costs legally taxed, and that thereupon his bond be vacated and canceled. It is further ordered that said property, nevertheless, shall be delivered to and received by the Texas Pacific Railway Company subject to and charged with all traffic liabilities due to connecting lines, and all contracts for which said receiver is or might be held, made, or in any way liable, and subject, also, to any and all judgments which have heretofore been rendered in favor of intervenors in this case, and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors while it retains the cases for these determinations on interventions now pending, or which may be filed prior to February, 1889; and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against property in the hands of said company or its assigns to the same extent they could have been enforced if said property had not been surrendered into the possession of said company, and was still in the hands of the court; and with the further condition that the court may, if needful for the protection of the receiver's obligation and liabilities recognized by this court, resume possession of said property. The bills in this cause will be retained for the purpose of investigating such liabilities and obligations, and for such other purposes as may seem needful. It is ordered that all claims against the receiver, as such, up to said 31st of October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date, that the same be barred, and shall not be a charge on the property of said company. It is further ordered that said receiver advertise in a daily newspaper, in New Orleans and in Dallas, the fact of his discharge, and a notice to said claimants to make claim within the time aforesaid, to wit, before the 1st of February, 1889, and that he put a printed notice of similar purport in the station-houses of said railway."

It appears, from the testimony of the receiver, that in the autumn of 1885 the company became satisfied that it could not longer continue to pay interest on its bonded debt without first expending a large sum of money in renewal of tracks, raising roadway, widening cuts and embankments, putting in

new cross-ties, purchasing rolling stock and motive-power, and the renewal of bridges, and other like improvements.

To ascertain what should be done, the directors appointed a committee, who, with experts, were directed to examine into the condition of the road, and report what as well as the sum necessary to place the road in good condition.

The result of that report was a determination to cease to pay interest, and to place the road in the hands of a receiver, which was done, it being thought, however, that the road would probably have to be sold to satisfy mortgages, which was obviated, at the end of a receivership lasting nearly three years, by some scheme devised by a board known as the "committee on reorganization."

While the road was in the hands of receiver, all the earnings and income, after paying recognized operating expenses, were expended in improvements such as have been already referred to, as was also a large additional sum furnished by the stockholders. Money seems also to have been borrowed for improvement purposes, a large part of which has been paid.

The receiver and railway company both pleaded the full discharge of the former from the receivership, and alleged that all the property of the company was delivered to it on October 31, 1888, in pursuance of the order before referred to, which was alleged to have been fully complied with; and the latter pleaded that it held the property charged with all liabilities imposed by the order before referred to, but denied that it was liable for the claim of plaintiff, unless he had intervened in the suits pending in the circuit court of the United States sitting for the eastern district of Louisiana in the city of New Orleans within the time prescribed by the order, and had there established his claim.

Appellee was in the employment of the receiver at the time he was injured, and engaged in carrying on the business.

It is contended that the court erred in holding that the railway company would be liable in a case in which the receiver before discharged would have been liable, if while in his hands receipts were used in making permanent improvements on the road to an amount more than sufficient to meet the judgment, although the injury occurred while the road was operated by and under the control of the receiver.

This, with the third, fifth, and ninth assignments, will present the questions presented by appellant on the first branch of the case. These assignments are:—

“The court erred in giving special charge No. 2, asked by plaintiff, to the effect that if the net earnings were used to improve the road and its rolling stock, and the company received said road in its improved condition, then the property in the hands of the company would be liable to the extent of the value of said improvement. This was error, because there was no pleading raising such an issue, and because there was no evidence that there was any net earnings applied to the improvement of the road.”

“The court erred in refusing special charge No. 3, asked by defendant, to the effect that plaintiff could not recover if at the time plaintiff was injured the railway was in the exclusive management of a receiver appointed by the circuit court of the United States.”

“The court erred in not granting a new trial, because the evidence showed no liability of the defendant that could be enforced in this court, and that the decree of the United States circuit court discharging the receiver protects this defendant against the enforcement of this claim in this court.”

There is much reason for holding that a receiver does not sustain to a railway company whose property is placed in his hands by a court having jurisdiction over the property the full relation of servant to master or of agent to principal; for he is selected by the court, and must act in accordance with its orders.

Although charged with a duty to the public which must be discharged through the use of its property, a railway company, under the present state of the authorities, in the absence of some statute so providing, will not be liable for acts of the receiver by reason alone of his relation to it. When its property becomes liable for his acts, this rests on the existence of some fact other than the mere existence of the receivership and his breach of duty.

If, however, it should be made to appear, as is contended was the appointment of the receiver whose acts are in question, that an appointment was collusive, and, in effect, made at request of and for the benefit of the company for the purpose of placing, for a time, its property beyond the reach of some classes of its creditors, then it might with some propriety be held that the receiver was but the servant or agent of

the company for whose acts it would be as fully responsible as though he was appointed by its stockholders or directory.

There are facts in the record tending strongly to show that the company was the mover in the matter of receivership, and that its management in the court was through amicable understanding between the company and those adverse to it on the record, with a view to settlement, not through foreclosure, but by dismissal of the suits after such time as its property had been held beyond the reach of some creditors, and had been largely augmented in value by improvements made from earnings.

We are not authorized, however, to believe, had this been the case, that the court would have continued the receivership, nor are we authorized to revise the action of that court in reference to any matter to which its jurisdiction attached.

It may further be true, if a railway company permits its property to remain in the hands of a receiver appointed by a court having no jurisdiction over its property, that it ought to be held liable for his acts while in control of the property.

The record shows that the receiver was appointed by a circuit court of the United States for the eastern district of Louisiana, while the property of the Texas Pacific Railway Company is in Texas, and that the business of the receivership was conducted in that court. We are not informed by the record in what manner jurisdiction was acquired by that court, and it may be that it had none; but that court having assumed to exercise jurisdiction over the property, we cannot undertake to decide from the record before us whether it lawfully did so, and in the disposition of this case will assume that the receivership was valid.

Appellee seeks to recover for an injury received by him while in the employment of the receiver, who testified that all the "earnings and income of the road, after paying operating expenses, . . . were appropriated to the improvement of the road"; and on offer to prove the sum so expended, it was agreed or admitted that "the betterments placed on the road out of the earnings of the railway . . . were of value sufficient to more than cover the amount claimed by plaintiff in this suit." Under this admission, it must be held that earnings of the road, while in hands of receiver, more than sufficient to entitle appellee to have the judgment paid out of appellant's property were used in making improvements. The

purpose of this admission was to render other proof on that point unnecessary.

The pleadings and this proof and admission properly present the question whether appellant is liable if the accident for which damages are claimed occurred under such circumstances as would have entitled appellee to payment out of earnings of the road had he recovered judgment pending the receivership.

The question is in no manner complicated by rights or claims of other persons, but rests against appellant, who has received and retains, invested in betterments, a sum which ought to have been paid to appellee if he was injured under such circumstances as to give right of action against the receiver.

That a claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating a railway is entitled to payment out of current receipts is well settled: *Ryan v. Hays*, 62 Tex. 42; *Barton v. Barbour*, 104 U. S. 130; *Kain v. Smith*, 80 N. Y. 470, and cases cited; *Brown v. Railway*, 9 Am. & Eng. R'y Cas. 723; *Hale v. Frost*, 99 U. S. 389.

If such earnings be invested in betterments, which without sale are returned to the company with its other property at the close of receivership, then the company must be held to have received the property charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings.

The principle involved in this is illustrated by many cases: *Ryan v. Hays*, 62 Tex. 42; *Fosdick v. Schall*, 99 U. S. 253; *Barton v. Barbour*, 104 U. S. 130; *Hale v. Frost*, 99 U. S. 389; *Milttenberger v. Logansport etc. R'y Co.*, 106 U. S. 287; *Addison v. Lewis*, 9 Am. & Eng. R'y Cas. 702; *Railway v. Davis*, 26 Am. & Eng. R'y Cas. 425; *Burnham v. Benen*, 17 Am. & Eng. R'y Cas. 308.

This general rule seems not to be controverted by appellant's counsel, but it is contended that the decree under which the receivership was closed and the property returned to the company relieved it from any liability for any claim not established by intervention in the suit pending in the circuit court of the United States sitting at New Orleans.

Both parties pleaded that the receiver was discharged and the property all returned to the company under the order of October 26, 1888, and that this was the effect of the order there can be no question.

This ended the control of the court over the property, and the asserted reservation of the right again to assume control amounts to nothing in the disposition of this case.

The court's custody went with the discharge of its receiver and return of the property to its owner.

Its process cannot run here, and it has no means whereby it could again acquire custody of the property, unless it be true that the jurisdiction of that court is extraterritorial. Such we do not understand its jurisdiction to be.

What a circuit court of the United States sitting within the territory where the property is situated might do through an original proceeding is not the question presented.

The property, having been released from the custody of the court which once, either rightfully or wrongfully, assumed to have possession of it, stands subject to any claim or charge that may rest upon it; and this may be enforced by any court having jurisdiction through appropriate process, unless the order hereafter to be considered takes away that right.

Appellee was not a party to the suit pending in the circuit court of the United States sitting in the eastern district of Louisiana, and its decrees are not binding upon him, whatever may be their effect upon those who were parties.

It is contended, however, that that court had power to require all persons who had claims with which the property once in the custody of the court was charged to present their claims, by intervention, for adjudication in that court.

Whence that power we know not. Courts may make erroneous rulings which will bind parties to a litigation in which they were made, but they have no power to make laws which will bind strangers to the litigation.

Had the receivership not been closed, such an order, in so far as it might be sought to bind appellee through it, would be inoperative, and in conflict with the act of Congress passed March 3, 1887, which permits persons having claims against receivers to sue upon and establish them in any court having jurisdiction, without leave previously given by the court appointing the receiver. The order relied upon, if given effect, would annul the act of Congress.

It is contended further, that not only was it necessary for appellee to establish his claim through intervention, but that such intervention should have been made within the time prescribed by the order, or the claim be forever barred, and no longer remain a charge on the property. It is generally

understood that in our form of government none other than that to which the power to make laws is given have such power.

Within what time a claim shall be established, or action brought to establish it, must be determined by the law-making power, except in those cases in which, from long lapse of time, courts of equity have felt authorized to refuse to enforce them.

The court, in the order referred to, undertook to establish arbitrarily a fixed period, which might arise within as short a time as three months after a cause of action arose, within which it would be barred. The court had no rightful power to make such an order.

Looking to the record, it seems to us that no better scheme could have been devised than seems to have been pursued in the cause in which the receiver was appointed and receivership conducted, to enable a railway corporation and its creditors secured by mortgage to operate it for a series of years, and build up a fine property for their mutual benefit at the expense of those who were largely entitled to the earnings.

The receivership was established and conducted in a state other than that in which the property was situated. How jurisdiction was acquired we are not informed.

The proceedings might as well have been in Mexico, Oregon, California, or Florida, as in Louisiana, so far as the record shows.

The property, a long line of railway running across the northern part of this state, was thus operated for nearly three years. A great part of the earnings were appropriated to better the property.

A passenger, shipper, furnisher of material, day-laborer, or employee, having just claim for compensation or damages, unless this was awarded by the receiver, might sue, if able to bear the expenses of litigation, in a place distant from where his evidence of right might be obtained, where, according to the usual practice of the court, his claim, when it suited the convenience of all parties, would be submitted to a master in chancery, and his right thus determined, when, under the act of Congress, it was his right to sue in any other court having jurisdiction of his cause, and to have an inexpensive trial in the mode appropriate under the law for the trial of his cause. This, too, after the property had passed from the custody of the court, was required to be done by all who then held un-

adjusted claims within an arbitrarily fixed period, when the receiver was no longer under the power of the court.

The orders seem to have been well adapted to the protection of some interests,—but those were the interests of the company, lien creditors, and the receiver,—at the inconvenience, if not at the expense, of that class of creditors whose several claims were comparatively small, but were charges to the extent of all betterments made with earnings.

This last class of creditors, under the act of April 2, 1887, as well as the act of March 19, 1889, had lien to extent of earnings used in improving the company's property, which could no more be destroyed by the orders relied on than could this action, then pending, thus be abated or rendered fruitless. So much of the order relied on as declared that the property in hands of the company should be held subject to all claims which might have been enforced against it while in the custody of the court, its jurisdiction over the property for the purposes of this case being conceded, was obviously correct, and the company having so received it must so hold it.

That order, however, is not the true foundation on which the charge or lien rests. It rests on the statute; but in the absence of this would rest on the existence of facts which under general principles applicable create such a charge or lien, and no order of any court can change the effect of such facts, or affect one not a party to the proceeding in which the order was made.

So much of the order as required intervention, and provided a time within which this should be made, was inoperative upon any right of appellee. If the court had power to resume custody of the company's property, a sufficient answer to the claim of appellant, that resort must be had to that court by appellee to enforce his claim, is, that the court has not exercised such a power, and in effect has declared that it would not to enforce any claim not reduced to judgment by intervention in that court; and the property stands subject to any proper process for the collection of judgment.

That a receiver controlling the property of a railway company is, in a limited sense, the representative of the corporation cannot be denied, for on account of his conduct a liability may be fixed upon its property, which earnings, while in the hands of a receiver, are as much as is the *corpus* of the property. A judgment against him in actions of this character binds such property of the company, and it is not held to be

necessary, pending receivership, to join the company as a defendant.

A person through whose acts such a liability may be imposed on the property of another, thus fixed by judgment against him alone, and enforced through process to which the owner is not a party, is the representative of the person or corporation to the extent of the fund which may be affected by his act, and subjected through judgment against him alone to satisfaction of claim thus arising.

Current legislation all tends to show that the consensus of legislative bodies repudiates the technical holding that a receiver is only the arm of the court, and recognizes the real relation arising from the facts. The act of Congress before referred to recognizes the representative character of the receiver.

The act of March 19, 1889 (General Laws, page 57) recognizes it, and declares that the discharge of a receiver shall not work an abatement of a suit pending against him, nor affect the right of any one having claim to sue him after discharge; it gives the right to prosecute such an action against the receiver alone, or to join with him the person or corporation whose property was once in his hands as receiver.

It further provides that "all parties and corporations whose property has been placed in the hands of a receiver by order of court, and which was not sold by the receiver, and which property has been redelivered back to the original parties or corporation without sale of such property, shall be liable and held to pay all of the unpaid liabilities of the receiver in causes of action arising out of and during the receivership; and if there are any suits pending against the receiver at the date of discharge on causes of action arising during the receivership, the plaintiff shall have the right to make the party or corporation to whom the receiver delivered the property which was in his hands as receiver a party defendant, along with the receiver; and if any judgment is rendered against the receiver for causes of action arising out of and during the receivership, then the court shall also, at the same time (if the party or corporation receiving back the property have been made party defendants), render judgment in favor of the plaintiff against both defendants for the amount so found for plaintiff, and all costs, and plaintiff shall have the right to foreclose his lien on the property delivered back by said receiver to said party or corporation."

Such proceedings against one not a representative of the fund or of the owner of a fund to be subjected, but once the mere arm or officer of a court, now cut off by discharge, could not be entertained.

This act was not in force when the judgment was rendered in this cause, but it tends to show that the legislature recognized the fact that receivers really have a representative character necessary to the prosecution and enforcement, if not to the existence, of rights which the courts at all times have not fully recognized.

In view of the fact that the business and property of large corporations, charged with duties to the public which can be discharged only by the business being conducted, are at this day frequently held for long periods in receiverships, it may be found in the future necessary and proper to hold that in such cases receivers are more fully the representatives of such corporations than they have heretofore been held to be.

Objections to the judgment, based on the former existence of the receivership and orders made in discharging that, not being tenable, the only inquiries that remain are whether the facts entitled appellee to the judgment, and whether errors on the trial were committed as claimed.

Appellee was in the employment of the receiver as an engineer, and was injured by derailment of the locomotive on which he was; and the evidence showed very clearly that this was caused by a defective switch.

The evidence further tended to show that the train might have been stopped before the locomotive turned over, and thus injured appellee, even after it was derailed, had the air-brakes been in proper condition.

It is urged that "the court erred in refusing special charge No. 2 asked by defendant, to the effect that if the wreck was caused by a switch being out of place, and the switch was left out of place by a conductor or brakeman on another train, and such other brakeman or conductor could have properly adjusted the switch, then their negligence would be the negligence of a fellow-servant, and plaintiff cannot recover"; and that "the court erred in overruling a motion for a new trial, because the evidence is not sufficient to sustain the verdict, because all the negligence that was shown was the negligence of a fellow-servant of plaintiff, and there was no proof of negligence to make the defendant liable."

The evidence shows that the switch was defective, in that

the spring was not strong enough to throw the point of the switch to the main rail, and there hold it when the lever was in proper position to indicate to the engineer that the rails were in proper position for the car to pass. In approaching the switch the engineer saw that the lever was in position, which indicated that the rails were in proper position; but before reaching the switch he saw that this was not true, when he used all the means in his possession to stop the train, but was unable to do so in time to prevent the injury.

The errors above assigned are based on the proposition that other employees of the receiver might have placed the rails in proper position by the use of a maul, ax, or some substance which would have kept the rails in proper place, and that for this reason the injury resulted from the negligence of a fellow-servant, and not from a defective switch.

The propositions cannot be maintained. If the machinery relied upon by the receiver to keep the rails in proper position was so defective that it did not accomplish that purpose, then he had failed in duty to the employee, which fixed liability, and could not be relieved from that by the fact that some other employee, by the use of some unusual means, might have placed and held the rails in proper position.

The charge refused was not applicable to the facts proved.

It is urged that "the court erred in refusing special charge No. 4 asked by defendant, to the effect that plaintiff could not recover on account of any defect in the brakes on the car that was derailed."

The evidence tending to show that, notwithstanding the derailment, the locomotive and train could have been stopped before the locomotive turned over and thus injured appellee had the air-brakes been in order, and also tending to show that the brakes would not work because out of order, the court did not err in refusing to give the charge requested.

It is urged that the verdict is excessive; but although large, this must be determined by the facts, and due weight given to the finding of the jury.

At the time appellee was injured he was thirty-four years old, in good health, and endowed with vigorous constitution and firm physical development. He was earning from \$165 to \$195 per month.

As the effect of injury received, he has been incapacitated to perform any useful or profitable labor, is bereft of the sense of hearing, is physically a wreck, and can look to a fu-

ture of suffering such as with most persons would make life a burden.

Though large, we cannot say that the verdict is excessive; and finding no error in the judgment, it will be affirmed.

THE CASE OF *Texas Pacific R'y Co. v. Overheiser*, 76 Tex. 437, involves the same facts as the principal case, so far as the appointment and discharge of the same receiver are concerned. The same petitions, orders for the discharge of the receiver, and questions raised by the assignments of error appear in that case as in this, except that the receiver was appointed at the suggestion of the company does not appear. As far as the questions involved in both cases are the same, the rulings in the principal case are followed. It appeared in that case that the appellee Overheiser was employed in the service of the receiver as a brakeman, and was injured while leaving the track, after having gone between two cars for the purpose of uncoupling them. His injuries were permanent in their character, and resulted in the amputation of all of his left foot with the exception of a small portion of the heel, and the shriveling of the leg nearly to the knee. For these injuries he recovered a judgment against the appellant company for seven thousand five hundred dollars. He attempted, in the only way in which it could be done, and following the rules of the company, to uncouple the cars, and went between them for that purpose, and found the coupling-pin fast in the draw-head. He then signaled the engineer to stop the train so that he could uncouple the cars, and when it stopped he attempted to remove the pin; but finding it still fast, he signaled for the slack of the train to enable him to remove the pin, and as the train was moving slightly, he walked along ten or twelve feet between and with the moving cars. He then removed the pin, and in attempting to step from between the cars his left leg was caught, and to save himself he threw his body outside of the track, and the car-wheel passed over his foot. At the place where the accident occurred the space between the ties from end to end was not entirely filled with earth, though the space between the rails was so filled; but it did not appear that he was injured because the filling between the ties was incomplete, but that he was unacquainted with the place and the condition of the cars and rails, though before attempting to uncouple the cars he saw that the space between the ties was not entirely filled. The appellee rested his case on the proposition that he was caught while leaving the track, either by a defective brake-beam or a sliver from the rail, and there was evidence that a piece of iron resembling the latter was found in his pantaloons-leg where torn, and on the lower part of his leg. It is assigned as error that the court below erred in refusing to give, at the request of the appellant, instructions "to the effect that if plaintiff was negligent in walking along between the cars while they were moving over a road-bed that he knew was not filled in between the ties, and that such negligence contributed to his injury, then plaintiff cannot recover." The court instructed the jury that the appellee could not recover if his own negligence contributed to his injury; "and also, at request of appellant, the court gave the following instructions: 'It is the duty of a railway company to furnish a safe road-bed and iron rails; and if the road-bed or rails were not safe and suitable when plaintiff was hurt, and their defective condition caused plaintiff's injury, then he can recover, unless you find that he knew, or by ordinary diligence could have learned, of the condition of the road-bed and rails; and if he knew or could have known by ordi-

nary care of the condition of the road-bed and iron rails, then he cannot recover for any injury caused by such defects. . . . The jury are charged that if the plaintiff was negligent in uncoupling said car, and said negligence contributed to or caused the injury to him, then he cannot recover, although the receiver may have been negligent also in not keeping a safe road-bed and iron.' " It was also urged that the court below erred in not granting a new trial on the ground that the verdict and judgment were excessive, and also on the ground that the appellee knew the condition of the road when he went between the cars, and was negligent in so doing while they were in motion. In relation to these grounds of error the court said: "The jury found that he was not negligent in these matters, the court below approved their finding when its correctness was questioned on motion for new trial, and this court, on the evidence, would not be justified in setting the finding aside. Under these facts, we cannot say that he was negligent, even if the injury had resulted from the fact that the space between the ties was not entirely filled. The court, under the evidence, might properly have withdrawn from the jury any question as to whether appellee was injured in consequence of defect last named, for the evidence would not, perhaps, have sustained a finding to that effect; but there is no reason to believe that the jury were in any respect misled by the manner in which the cause was submitted to them. The evidence in some respects was somewhat circumstantial, but we cannot say that it was not sufficient to sustain the verdict, and the judgment will be affirmed."

In the case of *Texas Pacific R'y Co. v. Griffin*, 76 Tex. 441, the appellee was injured through the negligence of J. C. Brown while receiver for the appellant. Griffin recovered a judgment for \$4,400 against the receiver, and afterwards sued the appellant on such judgment, and recovered a judgment for \$4,605, from which this appeal was taken. The questions involved, the defenses made, and the errors assigned raised the same questions considered and decided in the principal case, and for that reason the rulings in the latter case were reiterated in this; the court deciding that the judgment against the receiver while he was in control of the property of appellant before his discharge established the right of the holder to have it satisfied out of the property returned at the close of the receivership, as it appears that the net earnings of the road before that time were sufficient to pay the claim, and that they had been expended in making improvements which the company received. The judgment against the receiver, which is made the basis of this action after his discharge, is conclusive as to the right of the appellee to be paid out of the fund received by the company, which in the hands of the receiver would have been subject to the claim, in the absence of fraud in the procurement of such judgment.

In the case of *Brown v. Gay*, 76 Tex. 444, an action was brought by Nancy J. Gay against Brown, as receiver of the Texas Pacific railway, to recover damages for the killing of J. M. Gay, her husband, while he was in the employment of the receiver, and under circumstances making the latter liable in his official or representative capacity. Among the defenses set up by the answer, it was alleged that the appellant held his appointment as such receiver by order of a circuit court of the United States, and could not therefore be sued except by permission of such court. That being a resident of Dallas County, he could not be sued outside that county. The appellant also set up his final discharge as receiver before the hearing of this action, and also the conditions of the order of such discharge, under which the appellee's claim was declared barred unless presented before February 1, 1889,

to the court appointing the receiver; that appellee had neglected and refused to so present his claim. Attached to the answer was the petition for discharge and the order of discharge of Brown as receiver. These were the same as those shown in the principal case of *Texas Pacific R'y Co. v. Johnson*, above reported. The appellee excepted to the matter set up in the appellant's answer. The court sustained the exceptions, and on a hearing, judgment was rendered in favor of the appellee for ten thousand dollars.

In deciding the questions involved, this court determined that there was no error in holding that the action was properly brought against the receiver without leave of the court appointing him, nor was there error in holding the suit properly brought in Tarrant County. It was shown that the receiver had been discharged, and all property in his hands delivered to the company, under order of the court appointing him; such order declaring that the property should remain liable in the hands of the company for claims properly existing against the receivership. The court below ruled that this action might be maintained against the party acting as receiver at the time of the accident, though he had ceased to act as receiver or have control of the property out of which the judgment was to be paid. The only ground upon which such judgment against the receiver can be enforced against the property of the company is, that he, with reference to such property, is the representative of the company, and it cannot be said that he is such representative after he has been discharged by order of court, and has withdrawn from all control, or right of control, over the property. Therefore, in such case, a judgment against him as receiver would be fruitless, and does not bind the property. From the facts stated in the pleadings, it was clearly shown that no judgment could be legally rendered against the receiver as such, but they did show that the company for whom he acted should have been made defendant, and the court should have declined to proceed with the case until such company was substituted as party defendant. Therefore the court erred in rendering judgment against the receiver. In support of this view the court cites and quotes from *Ryan v. Hays*, 62 Tex. 47, as follows: "The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official career ceases, and the property through which alone his official liability may be discharged has passed from his hands in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him; with the termination of his official existence ends his official liability"; and also cites *Trust Co. v. Railway*, 7 Fed. Rep. 537; *Davis v. Duncan*, 17 Fed. Rep. 477; *International etc. R'y Co. v. Ormond*, 62 Tex. 274; *White v. Keokuk etc. R. R. Co.*, 52 Iowa, 97. In speaking of the fact that the company should have been substituted as party defendant, the court said that "this, in analogy to other cases in which a defect of parties arises after action brought, is believed to be the correct practice in cases in which a receiver dies, or is removed after action brought against him or by him, or in case a receiver defendant is discharged, and the property in his hands subject to payment of a judgment to be rendered is returned by order of court to its owner: *Wilson v. Wilson*, 1 Barb. Ch. 592; *Palmer v. Murray*, 8 How. Pr. 549; *Searcy v. Stubbs*, 12 Ga. 438; *Lehigh etc. Co. v. Central Railway*, 42 N. J. Eq. 591; *Talmage v. Pell*, 9 Paige, 413; *Sheldon v. Adams*, 27 How. Pr. 180; R. S., arts. 1246, 1255." In closing, the court said: "The receiver was such representative of the company when the action was brought as to make it practically, then, an action against the company, and for this reason it would not abate when he was discharged.

but might be further prosecuted against the company, if substituted for the receiver, who has ceased to represent it; but to recover then it would be necessary for the appellee to allege and prove such facts as make property in the hands of the company liable to satisfy the judgment to be rendered." For the reasons given, the judgment is reversed and the cause remanded, with leave to the parties to pursue such course as to them seems proper.

GALVESTON, HARRISBURG, AND SAN ANTONIO RAILWAY COMPANY v. SMITH.

[76 TEXAS, 611.]

MASTER AND SERVANT — MASTER'S LIABILITY FOR NEGLIGENCE. — The master is liable for negligence in the performance of duties he has impliedly contracted to perform toward his servant, no matter whether he attempts to perform them in person or by another; and the true test to determine whether the rule applies is to be found in the character of the act performed which causes the injury, and not in the rank, grade, or department of service of the person performing it. If there is a neglect of one of the duties the master has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it.

MASTER AND SERVANT — FELLOW-SERVANTS — ROAD-MASTER AND SECTION-HAND. — A road-master having charge of a working-train and its operatives, with power to employ and discharge the men, is the fellow-servant of a section-hand riding on the train and working under his direction, so as to prevent the section-hand from recovering damages from the company for an injury received in a collision caused by the road-master's negligence.

MASTER AND SERVANT — NEGLIGENCE OF SUPERINTENDENT NEGLIGENCE OF RAILWAY COMPANY. — It is the duty of a railway company to give such information and orders to its servants in charge of its trains as will enable them to avoid collisions, and the neglect of the company's superintendent in this respect is the negligence of the company, and the doctrine of fellow-servants does not apply in case of injury to the train employees.

ACTION to recover for personal injuries. Plaintiff below, M. Smith, was employed by defendant below as a section-hand. Early on the morning of November 30, 1886, plaintiff, with other section-hands, was carried in a caboose belonging to defendant, from Smith's Junction to Alleytown. When they reached the latter place they were carried past the station, in order to back in on a side-track, and get flat-cars to haul sand upon. As they were backing in, or about to back in, the caboose was run into by a freight train, and plaintiff sustained the injuries of which he complains. The remaining facts are stated in the opinion.

Brown and Dunn, for the appellant.

Delaney, Kennon, and Harrison, for the appellee.

COLLARD, J. The court instructed the jury as follows:—

"10. If you find, from the evidence, that plaintiff was injured as hereinbefore stated, and that such injuries resulted from the negligence of defendant's road-master, and that said road-master had full control over the movements of the train on which plaintiff was at the time of collision, if any occurred, and did actually direct and control the movements of said train, and that he had general power to employ and discharge men in defendant's employ working in the same capacity in which plaintiff was then working, in that case the negligence of the road-master would be deemed the negligence of the defendant."

On the same subject, the defendant requested the following special instructions:—

"2. You are charged that the plaintiff, being one of the employees of defendant, cannot recover for any injury he may have sustained while in its service, on account of the negligence of another employee, no matter in what grade he may have been; and the fact that such co-employee was in a different grade of defendant's employment from the plaintiff will not affect this rule, and you will find for defendant.

"3. The plaintiff, by the allegations of his petition, being an employee of defendant, entered its service upon the implied understanding that he would assume all the risks ordinarily incident to such employment, among which were the risks of injuries resulting from the negligence of a fellow-employee; wherefore, if you believe, from the evidence, that plaintiff was injured, that such injury resulted from the negligence of either the road-master, John Kennedy, or the conductor in charge of the train, or the engineer in charge of the engine drawing the train on which plaintiff was at the time of the injury, then he cannot recover, and you will find for the defendant."

Appellant assigns the following error: "The court below erred in refusing to instruct the jury, as asked by the defendant in its charges No. 2 and No. 3, and in giving in lieu of them the tenth paragraph of the charges asked for the plaintiff, wherein the jury were told that the road-master's negligence would be the negligence of defendant, for the reason that, by the undisputed evidence in the case, the road-master

was only the fellow-servant of the plaintiff, and if by the negligence of the former the latter was injured, there would be no liability on the part of the defendant for such injury."

As to the road-master's authority over a work train and its operatives, we make the following extract from plaintiff's testimony: "All the personal knowledge I have of the amount of authority that Mr. Kennedy has is, that he is road-master. If an engineer don't suit him, he can send him off and get another,—that is, an engineer that is working for him. Every train that I have seen in that business, the road-master, as long as he stays with it, has charge of it. As long as the road-master has charge of that kind of a train, he has the right to discharge the engineer, or at least to send him off and get another. The road-master would put the conductor off, too, if he did not suit. I know that to be so. I know that he can send the conductor away, out of his employ, and get another if he don't suit. He can discharge the conductor or engineer out of his employ, but I could not say he could discharge them out of the company's service. The road-master has this authority only when the train is with him."

It is needless to say that this evidence is in conflict with that adduced by defendant. The questions presented by the assignment of error are, Was the road-master a fellow-servant of plaintiff? and did the charge of the court give the jury the proper criterion to determine the question? There is difficulty in answering these questions, because of the contrariety of opinions upon the subject. It cannot be decided by the mere grade of the company's agent charged with the negligence, as almost all grades and ranks in railway service have been considered and decided differently by different courts: 2 Thompson on Negligence, 1028-1038; Patterson on Railway Accident Law, secs. 324, 325. This variety of decisions grows out of the difference in the application of the principle which is claimed to be the test of fellow-servant.

Mr. Thompson, as a result of his investigation of the authorities, formulates a general rule, as follows: "All who serve under the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though in different grades or departments of it, are fellow-servants, who take the risks of each other's negligence": 2 Thompson on Negligence, 1026, sec. 31. The same rule, with some modifications, is given by other authors: 4 Wood on Railroads, sec. 388.

As applicable to railroad servants, a text-writer furnishes the following rule: "It therefore may be laid down as the result of the authorities, that, the common object of railway service being that of fitting the line for traffic and of carrying on the traffic, all servants who are working for the accomplishment of that common object are fellow-servants within the rule": Patterson on Railway Accident Law, sec. 323.

The application of the rule in anything like a strict sense would make all employees and agents of a railway fellow-servants, however distinct their employment, rank, authority, or relation to the company. Nearly all the relations of employees have been decided to create or not to create them fellow-servants. It has been decided in this state that the negligence of the conductor having control of the train and its operatives is not chargeable to the company, because he is a fellow-servant of the subordinate operatives. Superiority of rank and authority in the service is no test: *Robinson v. H. & T. C. R'y Co.*, 46 Tex. 550.

We cannot review the authorities holding contradictory views concerning the same relations of superiors and subordinates. It is sufficient to say that they cannot be reconciled upon the rules announced and quoted above. The supreme court of the United States were divided as to whether the company was liable for the negligence of the conductor of a train causing injury to an engine-driver by a collision, a bare majority of the court affirming a judgment in favor of the injured party: *Chicago etc. R'y Co. v. Ross*, 112 U. S. 377.

In treating the subject of vice-principals, Mr. Patterson speaks of the test admitted in some cases, holding that if the company gave to a servant the power of appointing and discharging subordinate servants, the servant invested with such power is a vice-principal; but he says: "A more logical test is to be found in the grant to a servant of that discretionary and supervisory power in the administration of a railway which is necessarily exercised by the controlling authority of the railway, or by some agent to whom it has been specially delegated": Patterson on Railway Accident Law, sec. 322.

Again, he says: "The general rule in the United States is that which is stated by Allen, J., in *Malone v. Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573, in these terms: 'When the servant by whose acts of negligence or want of skill other servants of the common employer have received injury is the *alter ego* of the master to whom the employer has left everything, reserv-

ing to himself no discretion, then the middleman's negligence is the negligence of the employer": Patterson on Railway Accident Law, secs. 321, 322. The principles in the above extracts approximate the rule as applied in this state.

In *Wall v. Railway*, 4 Texas Law Review, 36, the commission of appeals say: "The general test applied is as to whether such employee has the power to employ and discharge the servants who are subject to his control and direction. An agent having such authority has been generally considered, as far as the servants under his control are concerned, as in legal effect occupying the position of the master."

Justice Gaines, in commenting on the rule in *Galveston etc. R'y Co. v. Farmer*, 73 Tex. 85, says: "To a limited extent, the rule so laid down is correct. When the duty which the agent is required to perform is a direct obligation which the master owes to all his servants, the doctrine is applicable." The opinion then proceeds to illustrate the point, showing that the company is required to select competent servants, to furnish safe tracks and machinery, and that it owes this duty to all its servants; so that if it should delegate such matters to an employee of any grade, and the employee is negligent in the performance of the duty, the company would be responsible if injury resulted to another servant from such neglect or want of care. So we see the liability of the company is made to depend upon the servant's failure to exercise proper care in the discharge of such duties as the company owes to all its servants. This rule, as well as others, is ably discussed by George W. Easley, of the Chicago bar, in quite a lengthy article found in a note to the case of *Kirk v. Atlanta and Charlotte Air Line R'y Co.*, 25 Am. & Eng. R'y Cas. 513, and the conclusion attained, after exhaustive research, that this is the just rule. He says: "The just rule is, to hold the master liable for negligence in the performance of the duties he has impliedly contracted to perform toward his servant, no matter whether he attempts to perform them in person or by another. The true test, then, to determine where the rule considered applies is to be found in the character of the act performed which causes the injury, and not in the rank, grade, or department of service of the person performing it. If it be a neglect of one of the duties the master has impliedly contracted to perform, the master is liable, no matter what be the rank or grade of the person he has designated, because that person is an agent, and not a servant; but in all other

cases he is not liable, because of the application of the rule as to fellow-servants."

Our supreme court has adopted this rule in the last case upon the subject, — a rule which has the merit of being certain and easily understood. In its application, it will only be necessary to ascertain if the injury complained of was the result of the negligent omission of a duty, or the negligent performance of a duty required by law of the master to all his servants. Of course, where the master is himself guilty of negligence, or where the corporate officers of a chartered company commit or omit the act constituting negligence, by which a servant is injured, liability would arise in all cases dependent upon other known principles. The rule is intended as a guide in cases of negligent acts of the agent which may be imputed to the principal.

Now, briefly to apply the rule to this case. If Kennedy, the road-master, had control of the train-men operating the train and its movements, and had power to employ and discharge the conductor and other operatives, and was guilty of negligence in moving the train from Columbus without notification as to the approach of specials with which there was danger of collision, or if his neglect consisted in having the train stopped at Smith's Junction for such time as rendered the danger of collision with other trains between there and Alleytown, or at Alleytown, imminent, the negligence would be his own, as an employee or servant of the company, and not the negligence of the company, in the same sense that the same negligence would have been that of the conductor under similar circumstances. In either case, it was the individual negligence of the servant, a fellow-servant of plaintiff. He was none the less a servant of the company by being its road-master. It was not alleged or shown that he was unfit or incompetent, or that the company was neglectful of its duty in employing him; nor does it appear that his authority to employ and discharge the conductor or train-men had any relation to the collision; for it is not alleged or proved that the conductor, or any other employee on the train having control of its movements, was incompetent, or that Kennedy's exercise of the authority to employ or discharge the operatives was the occasion of the accident. The court's charge upon this subject was erroneous.

There is another branch of the case not set out in the petition, except by general allegation that defendant's negligence

caused the injury to plaintiff, but which is shown by the testimony, and specially submitted to the jury in the charge of the court, which charge is made the subject of an assignment of error. The conductor of the special freight train that collided with the work train had orders to look for engine 69, between Eagle Lake and Columbus, after 6:45, A. M. Neither the conductor of 69 nor the road-master had similar orders in reference to the freight train. There was a telegraph office at Columbus, where they stopped all the night previous to the collision on the morning of the 30th of November, and from which point the engine, with the caboose, was moved on that morning. It was proved that such orders were delivered by the train-dispatcher, signed by the superintendent of the road. The collision occurred at Alleytown, between Eagle Lake and Columbus, at 7:10, A. M. The superintendent had given general orders to the conductor of the work train to "work between Eagle Lake and Columbus, avoiding regular trains, and guarding against specials." Had the superintendent given orders to this conductor to guard against the freight train, the conductor might have avoided the collision. It was impossible for him to flag against the special, because there was not sufficient time to do so after the train reached Alleytown and the collision. On the question here presented,—the duty of defendant to warn its conductors of the movements of other trains,—we note the following authorities:—

In a case in New York, where the superintendent failed to warn a conductor of one train of the dangerous approach of another that had the right to the track, because of which there was a collision, injuring an employee, it was held correct to submit to the jury the question as to whether "the defendant had omitted the doing of anything which ought reasonably to have been done to prevent casualty": *Sheehan v. New York etc. R. R. Co.*, 91 N. Y. 332. In another case, in Ohio, in which the superintendent of the company was clothed with the power to make and suspend regulations regulating the movement of trains, it was held that in legal effect he was the master; and as such, by special order, he required a work train to stand on the main track to load gravel, notwithstanding a freight train on its regular time was approaching, and did run into the work train, causing injury to a laborer thereon, it was held that the order suspending the general regulations was unreasonable, and that the company was liable: 5 Am. & Eng. R'y Cas. 530.

In another case, in Kentucky, where the telegraph operator made a mistake in writing out an order for a train, which induced the conductor to believe he might occupy the track longer than the time specified in the order, whereby a servant of the company was injured, it was held that the company was liable: *McLeod v. Ginther's Adm'r*, 8 Am. & Eng. R'y Cas. 162.

The cases where the superintendent was negligent were put on the ground that he was, by virtue of his powers, the master. But why was he master, unless because he was in such case clothed with powers that belonged to the company, the careful exercise of which was obligatory upon the company, — that is, charged by the company with duties it owed to its servants?

Whether we accept the reasons upon which the courts rested these decisions or not, the rule as given in the *Farmer* case still applies, as it will in the case of the failure of the operator to properly copy the order, which the court put upon the ground that he was a servant in a different department, and therefore not a fellow of the servant injured.

Upon the hypothesis that the company is bound to inform its servants, and warn them of what is necessary to avoid collisions with trains, and that it cannot shift its own duty to a servant, and then, in case of injury, claim that it was the result of negligence of a fellow-servant, the foregoing cases will stand upon the same principle. A failure to perform this duty increases the risk of employees on and operating trains, and exposes them to a risk not embraced in their implied contract. The company ought to know where its trains are, and if the operators do not know, it is the duty of the company to inform them, and give such orders as are reasonably necessary to avoid increased peril. When the proper servant is so informed and ordered, and he then neglects his duty or violates his orders, causing injury to another servant, the negligence would be his, and the doctrine of fellow-servants would apply.

It has been said "that it is the duty of railways to make regulations for the safety of their servants, and to use all reasonable means for the enforcement of those regulations": *Patterson on Railway Accident Law*, sec. 296, and authorities there cited.

It will not be held that it would be demanding too much of a railway company to give such information and orders to its servants in charge of its trains as will enable them to avoid

collisions. We are of the opinion that this is the duty of the company. The charge of the court made the neglect of the superintendent in this respect the neglect of the company, and in this there was no error. The assignment of error attacks the charge, not upon the ground that the negligence of the superintendent was not particularly pleaded, but on the ground that there was no evidence to justify it. We think there was evidence upon which the charge might have been given.

Because of the error in the court's charges holding the company liable for the supposed negligence of the road-master, we think the judgment should be set aside, and the cause remanded.

GAINES, A. J. At the time the commission returned their report and opinion in this case, the opinion in the case of *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, had not been published. In that case, we held that the servant of a railway company, while working under the immediate supervision and control of another employee of the company, was not the fellow-servant of such employee, provided the latter had the power to employ and discharge those who were subject to his orders. We are not now prepared to recede from that ruling. But that case is distinguishable from this. The appellee in the present case, at the time of the accident, was not employed under the immediate eye of the road-master. With the qualification that we do not approve any expressions in the opinion of the commission which may seemingly conflict with the opinion in *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4, 16 Am. St. Rep. 867, we adopt their opinion, and reverse and remand the case.

MASTER AND SERVANT — FELLOW-SERVANTS. — Who are and who are not, fellow-servants: See *Missouri Pac. R'y Co. v. Williams*, 75 Tex. 4; 16 Am. St. Rep. 867, and note.

MASTER AND SERVANT — VICE-PRINCIPAL. — Employers are answerable to under-servants for the negligence of superintendents and representatives acting within the scope of their employment; *Denver etc. R. R. Co. v. Driscoll*, 12 Col. 520; 13 Am. St. Rep. 243.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

BRINKLEY v. STATE.

[89 ALABAMA, 34.]

CRIMINAL LAW — MURDER — DUTY TO RETREAT — JUSTIFIABLE KILLING.

— A man assailed in his own house, if justified in ordering or expelling the deceased from his premises, is not bound to retreat to avoid killing his assailant, even though a retreat could be safely made.

EVIDENCE — OPINION. — Evidence that a dance, in which a party was engaged just before being killed by another, was "indecent" is inadmissible, as being a mere expression of opinion, and not a statement of fact.

INDICTMENT for murder, resulting in a conviction of murder in the second degree. Appeal, on exceptions, to the charge of the court.

Watts and Son, for the appellant.

William L. Martin, attorney-general, and *Tennent Lomax*, for the state.

SOMERVILLE, J. The killing of the deceased, in the present case, occurred in the house of the defendant, being perpetrated by shooting with a pistol. The evidence tended to show that the deceased had been guilty of profanity and indecent behavior, and was for this reason ordered by the defendant to leave the premises, whereupon an altercation ensued between them, which resulted in the killing.

The court, among other things, charged the jury that "it was the duty of the defendant to avoid the killing, if he could have done so without danger to himself." This charge was, in our opinion, erroneous, in ignoring both of the above-stated phases of the evidence. The defendant could probably have

avoided the necessity of the killing by retreating from combat and taking refuge in some place of safety. So he might have accomplished the same end by abstaining from administering any rebuke to the deceased for his alleged indecent conduct. Each of these courses might possibly have been resorted to without the least danger. Yet, as the defendant was in his own house and domicile, he was under no obligation to retreat. An assailed person is not bound to retreat from his own house to avoid killing his assailant, even though a retreat could be safely made: *Jones v. State*, 76 Ala. 8; *Cary v. State*, 76 Ala. 78; Wharton on Homicide, sec. 541. So if he was, under the circumstances of the case, justifiable in ordering or expelling the deceased from the premises, he would be under no legal necessity to avoid the altercation by yielding the right in question, as a mode of avoiding all apprehended violence. The charge assumed the contrary.

The statement of the witness, that the dance in which the deceased was engaged prior to the killing was an "indecent" one, was a mere expression of opinion, and not the statement of a fact. The objection to it was properly sustained.

We need not pass on the objection to the colloquy between the juror Blue and the trial judge, as it will not probably recur on another trial.

The other rulings of the court have been examined, and we discover no error in any of them, except the portion of the court's general charge numbered 2, which should not have been given. These charges involve questions too often considered by us to require discussion.

The judgment is reversed, and the cause remanded for a new trial. In the mean while, the defendant will be retained in custody until discharged by due course of law.

CRIMINAL LAW—SELF-DEFENSE.—A man's house is his castle, and sacred for the protection of his person and family: *State v. Patterson*, 45 Vt. 306; 12 Am. Rep. 200, and note 212-214, in which the rule is stated that "a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from the house even to the taking of life."

KING v. STATE.

[89 ALABAMA, 42.]

ORIGINAL LAW — ARREST — NECESSITY OF READING WARRANT. — An officer seeking to execute a valid warrant of arrest need not announce nor explain its contents to the accused, when he has knowledge of the charge contained therein.

ORIGINAL LAW — ARREST — RESISTING OFFICER. — A defendant cannot defy an officer seeking to execute a valid warrant for his arrest, and determine whether he will submit to arrest, nor can he elect before what magistrate he will be tried. It is his duty to quietly submit to arrest, and present his defenses afterward.

ORIGINAL LAW — ARREST — RESISTING OFFICER. — A defendant cannot defy an officer holding a valid warrant for his arrest, and after tortiously obtaining possession thereof, keep the officer at bay overnight, until the accused could obtain the advice of counsel, nor is it any excuse that the next morning he proposed to go with the officer and be tried before another justice than the one named in the warrant, provided his attorney advised him that the warrant was valid.

INDICTMENT for and conviction of resisting an officer in the execution of a warrant of arrest. Appeal on exceptions to the refusal of the court to charge as follows: "If the jury are in a reasonable doubt as to whether defendant assaulted Whitehead from any other motive than resisting the legal process, they must find for the defendant. . . . It was the duty of the officer to make known to defendant for what he was to be arrested; and if he failed to make it known to defendant, they must find defendant not guilty." The remaining facts are stated in the opinion.

H. L. Martin, for the appellant.

William L. Martin, attorney-general, for the state.

STONE, C. J. In *Jones v. State*, 60 Ala. 99, the officer attempted to prevent a breach of the peace within his presence, and was resisted in the attempt. He had no warrant or process for the arrest of any one. That case was clearly not within the statute, which provides only for resistance of an "officer of the state in serving, executing, or attempting to serve or execute," a legal writ or process: Code of 1886, sec. 3974. That case sheds no light on this.

The present case is peculiar in its facts. Williamson had sued out a warrant from a justice of the peace, charging that King was guilty of an assault. That warrant was in the hands of Whitehead, the constable, for execution, and Whitehead was spending the night at the residence of Williamson, the prosecutor. King, hearing in some way, not shown in the

record, that Whitehead had a warrant for him, did not wait for the officer to come to him to make the arrest. He went to the house of Williamson, and inquired for Whitehead. Being shown to his whereabouts, he asked the officer if he had a warrant for his arrest. He answered that he had. Both Whitehead and King made an unsuccessful attempt to read the warrant, when King snatched the warrant from the hands of the officer, and kept it until next morning. He did not then restore it to Whitehead, but, dropping it out of his pocket, Whitehead repossessed himself of it. King refused to go or be carried before Justice Trawick, who had issued the warrant, but declared his intention to carry the warrant to his attorney, at the county seat, for the purpose of learning whether the warrant was all right. He also used offensive, defiant language. Up to this point there was no conflict in the testimony.

It is manifest that King did not approach the officer with the intention of submitting to the process of the law, and we are convinced he knew what the charge was which led to the issue of the warrant. He did not profess ignorance of it. This excused Whitehead from announcing or explaining to him the contents of the warrant. It is difficult to resist the conclusion that the purpose of his visit was to show to Whitehead that he could not arrest him, and could not carry him before Trawick, the justice. His conduct is scarcely explainable on any other hypothesis. Without this inference, however, his conduct is wholly inexcusable, in any light in which we can view the undisputed testimony. It is not for the defendant to determine whether he will submit to arrest under process in the hands of a lawful officer, unless the process is void on its face; nor can he elect before what justice he will be tried. It was equally beyond the purview of his legal rights and duty to defy the officer, or keep him at bay, until, with the possession of the warrant, tortiously procured, he could obtain the advice of counsel. The process not being void, the law and good order demanded that he should submit to arrest, and present his legal defenses afterwards. The undisputed testimony shows that he resisted the officer in the execution of the process. There was testimony which makes defendant's conduct much more culpable, but we place our judgment on that which was most favorable to him: 1 Wharton's Crim. Law, sec. 652; 1 Bishop's Crim. Law, secs. 465-468; 2 Bishop's Crim. Law, sec. 1010.

The resistance, amounting to a rude assault according to some of the testimony, was perpetrated and made complete at the first interview with the officer. It was then he defied arrest. The next morning he was in more pacific mood, and proposed to go with the officer, not to the justice who had issued the warrant, but to Ozark, the court-house town, to be there tried before some other justice, if his attorney advised him the warrant was all right. Defendant offered to make this proof, but it was objected to and excluded. There was no error in this. What the defendant did on the morning of the 5th, even if it had been an offer to do what the law required of him, could not atone for his unlawful conduct of the evening before.

Neither of the charges asked should have been given. The defendant may have had a motive for assaulting the officer other than the resistance of the process in his hands. Still, if he resisted the execution of the warrant, as we have shown above that he successfully did, he was guilty, and was properly convicted.

If it had not been shown that the defendant knew for what it was proposed to arrest him, it would have been the duty of the officer to notify him. His whole conduct shows he had such knowledge. It was not necessary for the officer, in view of the undisputed facts, to go through the idle ceremony of making known to him what he already knew.

Affirmed.

CRIMINAL LAW — RESISTING AN OFFICER. — If the process under which an officer is acting is strictly legal, and he acts in good faith, it is a crime in any way to impede him: *State v. Terry*, 61 Vt. 624.

MARTIN v. STATE.

[89 ALABAMA, 115.]

CRIMINAL LAW — ARREST WITHOUT WARRANT. — A policeman or town marshal may, without warrant, arrest one who commits a breach of the peace in his presence, or who, by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit such breach.

CRIMINAL LAW — ARREST WITHOUT WARRANT — RIGHT TO SUMMON BY-STANDERS. — An officer having the right to make an arrest without warrant may summon by-standers to assist him, when necessary to make the arrest, and such summons clothes them with authority to render him all needed assistance.

CRIMINAL LAW — ARREST WITHOUT WARRANT — PROOF OF SUMMONING OF BY-STANDERS. — The words spoken by an officer to summons by-standers

to assist him in making an arrest without warrant may be given in evidence against any one, whenever the fact of their being summoned becomes a material inquiry.

PROOF OF OFFICIAL CHARACTER. — The official character of a deceased person may be shown by the evidence of witnesses, who testify that at the time he was killed he was acting as town marshal, wore a badge, and carried a policeman's baton.

CONSPIRACY, PROOF OF. — A conspiracy to do an unlawful act need not be shown by positive testimony; nor need proof be made that there was prearrangement to do the specific wrong complained of. This may be inferred from the conduct of the participants.

CONSPIRACY — WHAT CONSTITUTES — INDIVIDUAL LIABILITY OF CONSPIRATORS. — When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, or encourage each other in whatever may grow out of such enterprise, each is responsible, civilly and criminally, for everything which may proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators; but neither is liable for the independent act of another, outside the common purpose, and growing out of the individual malice of the perpetrator.

EVIDENCE. — **ACTS AND DECLARATIONS OF ONE CONSPIRATOR,** immediately after the killing of their victim by his co-conspirators, are admissible as part of the *res gestæ*, and as being part of one continuous transaction.

INDICTMENT for murder. In addition to the facts stated in the opinion, it is only necessary to add that, immediately after the killing, Will Martin said to George Martin, with an oath: "Get out of town; you have done the work for him"; to which George replied, that "he would not leave until he found what Jones had against him."

Sumter Lea, for the appellant.

William L. Martin, attorney-general, for the state.

STONE, C. J. It is certainly the law that a policeman or town marshal may, without warrant, arrest any one who commits a breach of the peace in his presence, or who, by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit a breach of the peace: *Hayes v. Mitchell*, 69 Ala. 452, and authorities cited; Code of 1886, sec. 4262. And such officer may summon to his assistance any by-stander, or any number of by-standers, when deemed necessary to effect the arrest, and such summons clothes them with authority to render him all needed assistance. And inasmuch as it requires some word or words spoken by the officer to effect the summons, such word or words, if they express nothing more, can be given in evidence against any one, whenever the *factum* of such appointment becomes a material

inquiry. The criminal court did not err in admitting evidence that Kelly summoned assistance to aid him in making the arrest, nor in allowing proof of his words by which he effected the summons. It was the proper mode of making the proof.

A question was raised in the trial court as to the manner of proving the official character of Kelly, who was the victim of the homicide. White, the mayor, and other witnesses, testified that he was acting marshal of the town, and that he wore a badge, and carried a policeman's baton. There was no error in admitting this evidence, and there was no necessity for producing any record or written evidence of his appointment: 1 Greenl. Ev., secs. 83, 92; 5 Wait's Actions and Defenses, 3-7; 3 Greenl. Ev., sec. 483.

The testimony tends to show that the Martin brothers, both being present, commenced the disturbance in the saloon kept by Jones, and that this disturbance led to Jones's absenting himself from his place of business after his pistol was taken from him by Will Martin, the defendant. The defendant, who testified in his own behalf, gave this account of the origin of the difficulty: "George, my brother, who is now dead, and I, went into Jones's saloon, and ordered beer. When we finished, George saw Matthews in the bar, who had discharged him from the mines, and he raised a difficulty with him, drawing a knife. Dee Jones drew his pistol, and I, thinking he was going to shoot me, took it away from him. He then left the bar." The testimony showed, without conflict, that when Jones left his saloon he went to another saloon, where Kelly was, and that Kelly summoned Wardrup and Jones to assist him, started in the direction of the Jones saloon, to arrest the two Martins. Several witnesses testified that when Kelly started to arrest one or both of the Martins, they were coming towards the place where Kelly was, from the direction of the Jones saloon, walking side by side, George Martin having an open knife in his hand, and Will Martin a pistol in his. Some of the witnesses said that each was waving or swinging his weapon as they approached. Kelly commanded George to surrender his knife, — some said he gave this command two or three times, — but it was not obeyed. The firing soon commenced. Some of the witnesses said that Will Martin fired the first pistol-shot at Kelly. He denied this, and said he did not fire. If he fired, it was with Jones's pistol, which he held in his hand. The ball, if fired, took no effect.

About the same time, or very soon afterwards, Kelly fired, and his ball took no effect. George Martin then took Will Martin's pistol from his pocket, and fired, killing Kelly. He then fired two other shots, probably at other members of the marshal's party, but without effect. It is not denied that George Martin fired the fatal shot, and that Will's ball, if he fired, did no injury. The question raised was, whether Will Martin was guilty of the homicide as a principal in the second degree.

The conviction was for manslaughter, and in that species of homicide there may be principals in the second degree: *State v. Coleman*, 5 Port. 32; 1 Bishop's Crim. Law, sec. 678.

Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony. Nor need it be shown that there was prearrangement to do the specific wrong complained of. When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, encourage each other in whatever may grow out of the enterprise upon which they enter, each is responsible, civilly and criminally, for everything which may consequently and proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators. And it is not necessary to this equal accountability that positive proof be made of the unlawful common purpose with which the enterprise was entered upon. It may be inferred from the conduct of the participants. "All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable, in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. . . . And where persons combine to stand by one another in a breach of the peace, with a general resolution to resist to the death all opposers, and in the execution of their design, murder is committed, all of the company are equally principals in the murder": 1 Wharton's Crim. Law, sec. 220. "It should be observed, however, that while the parties are responsible for consequent acts growing out of the general design, they are not for independent acts growing out of the particular malice of individuals": 1 Wharton's Crim. Law, sec. 397. And this is the general doctrine on the subject: *Smith v. State*, 52 Ala. 407; *Jordan v. State*, 79 Ala. 9; *Williams v. State*, 81 Ala. 1; 60 Am. Rep. 133; *Amos v. State*,

83 Ala. 1; 3 Am. St. Rep. 682; 1 Bishop's Crim. Law, sec. 649.

As we have shown, there was testimony tending to show that the two Martins were walking side by side, each with a weapon in his hand, and waving it, and that they were, in this attitude, walking towards Kelly, the town marshal. Whether Will Martin, the defendant, fired a pistol or not, it is not pretended that he offered any resistance when his brother took his pistol from his pocket, and with it killed Kelly. And his remark, immediately after Kelly was shot down, if the testimony be believed, shows that he was neither horrified nor surprised at the result. That George Martin was in a very lawless mood, with very lawless intent, is the testimony of all the witnesses, and Will Martin did not controvert but confirmed it. The jury were not without testimony from which they could draw the inference that the two Martins had a common purpose to set the law at defiance, and to use whatever force might be necessary to accomplish their object; and that each was ready to assist and encourage the other, if assistance and encouragement should become necessary. Finding this to be so, each was accountable for the act of the other, whether such act was previously intended or not, if it grew naturally and proximately out of the unlawful purpose they had in view.

The two charges asked for defendant each ignored the inquiry of conspiracy, or community of unlawful purpose, and for that reason, if for no other, they were rightly refused.

We think what took place on that occasion, including what the defendant said after Kelly was shot down, was one continuous transaction, and the court did not err in receiving the evidence that was objected to: *Smith v. State*, 88 Ala. 73.

The judgment of the criminal court is affirmed.

CRIMINAL LAW — ARREST WITHOUT A WARRANT. — Policemen may arrest without warrant persons committing offenses in their presence: *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100, and note; and may call upon bystanders to help him: Note to *Hawkins v. Commonwealth*, 61 Am. Dec. 154, 155.

CRIMINAL LAW — ARREST. — As to the notice and proof of the official character of the officer making the arrest, see note to *Hawkins v. Commonwealth*, 61 Am. Dec. 158, 159.

CRIMINAL LAW — CONSPIRACY — LIABILITY OF CONSPIRATORS. — In conspiracy, each conspirator is criminally responsible for the acts of his associates committed in furtherance of the common design: *Phillips v. State*, 25

Tex. App. 228; 3 Am. St. Rep. 471; *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320; *State v. Munchrath*, 78 Iowa, 270; *State v. Walker*, 98 Mo. 95.

CRIMINAL LAW. — PROOF OF CONSPIRACY, and the manner of procedure in cases of, see note to *Spies v. People*, 3 Am. St. Rep. 482-490. Declarations of a conspirator are admissible against his fellows, when they are in themselves acts, or accompany and explain acts, done in furtherance of the common design, if made during the pendency of the conspiracy: *State v. Melrose*, 98 Mo. 594; *Johnson v. State*, 87 Ala. 39; *Goins v. People*, 46 Ohio St. 457; *State v. Walker*, 98 Mo. 95; *People v. Irwin*, 77 Cal. 494.

GIBSON v. STATE.

[89 ALABAMA, 121.]

JURY AND JURORS. — Venire of special jurors summoned for a trial of murder cannot be quashed upon the grounds that one of those named is a minor, that another is a female, that another has been dead for more than a year, that another is a non-resident of the county, or that there is a mistake in the name of another. In such case it is the duty of the court to order the names of the disqualified persons to be discarded, and others to be summoned to supply their places, unless, in the opinion of the court, justice requires otherwise.

JURY AND JURORS — PEREMPTORY CHALLENGES. — Under the Alabama act of 1889, where two or more defendants are on trial jointly for murder, each is entitled to one half of twenty-one peremptory challenges, and it is a compliance with the statute, where two are thus on trial, to allow one eleven, and the other ten, peremptory challenges.

CRIMINAL LAW — MURDER — EVIDENCE OF GOOD CHARACTER, AND ITS EFFECT.

— A person on trial for murder is permitted to prove his good character for peace in the neighborhood in which he resides. But his own evidence to this effect cannot be considered by the jury as sustaining his credibility as a witness in his own behalf, when the prosecution has not assailed his character for truth and veracity.

TRIAL. — CHARGE OF COURT MUST BE CONSTRUED AS A WHOLE, in connection with the evidence, and not in disconnected parts, or by garbled extracts, to which exceptions are taken.

CRIMINAL LAW — MURDER — SELF-DEFENSE — BURDEN OF PROOF. — After an intentional killing with a deadly weapon has been proved, the burden of proof is on the defendant to show a pressing necessity on his part to take life in self-defense, and that he could not safely retreat without apparently increasing his peril, unless these facts are shown by the evidence produced by the prosecution.

CRIMINAL LAW — MURDER — SELF-DEFENSE — BURDEN OF PROOF OF PROVOCATION. — In murder cases the burden of proof is on the state, under a plea of self-defense, to show that the defendant was in fault in bringing on or provoking the difficulty, and not on defendant to prove that he did not provoke it.

CRIMINAL LAW — MURDER — PRESUMPTION FROM USE OF DEADLY WEAPON.

— The use of a deadly weapon in cases of homicide raises the presumption of malice, unless this is repelled by the evidence which proves the killing.

CRIMINAL LAW — MURDER — PROVOCATION. — Where a difficulty is sought by defendant with the deceased for the purpose of beating or chastising him, and in pursuance of such purpose defendant arms himself with a pistol, to be used in case of necessity, and with it kills deceased in pursuance of such purpose, the killing is murder, although it was necessary to use the pistol in order to save his own life, or his body from great harm.

CRIMINAL LAW — CONSPIRACY TO ASSAULT RESULTING IN MURDER. — Where a conspiracy between defendants to assault the deceased is established, and such assault results in killing him, each conspirator is criminally liable for the acts of the other, in the prosecution of the common design, which follow incidentally as one of its natural and probable consequences, even though not intended as part of the original plan.

CRIMINAL LAW. — CONSPIRACY TO KILL need not be proved by an express agreement on the part of defendants to attack or kill the deceased. An implied understanding between them to that effect, established by circumstances, is sufficient. The presence of one defendant, aiding, abetting, and encouraging the other in making the attack, will justify the jury in finding him criminally responsible for the attack which resulted in the death of the party assailed.

CRIMINAL LAW — MURDER — INSTRUCTIONS. — In murder trials the court need not charge the jury to the effect that unless the defendant is convicted of murder in the first degree, he must be acquitted, and cannot be convicted of any lower grade of homicide.

CRIMINAL LAW — MURDER — INSTRUCTIONS. — In a murder trial, instructions, if supported by the evidence, to the effect that if the jury are reasonably satisfied, from the evidence, that the defendant was in imminent peril to life or limb, from which there was no reasonable means of escape, and that he neither provoked nor encouraged the encounter, and then fired the fatal shot, but not in malice, he cannot be convicted of murder in either the first or second degree, are proper, and should be given.

CRIMINAL LAW — NO MURDER WITHOUT MALICE. — There can be no murder in either degree without malice. The most culpable phase of homicide without malice is voluntary manslaughter.

JURY, AND NOT COURT, IS JUDGE of the credibility of witnesses and the sufficiency of the evidence.

CRIMINAL LAW — MURDER — RIGHT TO INSTRUCTIONS. — A person charged with murder is entitled to have charges given, which, without being misleading, correctly state the law of his case, if they are supported by any evidence, however weak, insufficient, or doubtful in credibility it may be.

JOINT indictment and trial of Ben and Sam Gibson for the murder of John Smith, by shooting or stabbing him. Conviction of murder in the second degree. When the parties met, Ben Gibson asked the deceased why "he had gone into the field and cursed their old father." The deceased denied the charge, and backed away from his assailants, when Ben knocked his hat off, and in the ensuing difficulty the deceased was stabbed three times in the back, and fatally shot with a pistol in the hands of Ben. Deceased drew a knife after his hat was knocked off, and Sam Gibson also had a

knife in his hand as he approached the deceased. A motion made at the trial to quash the special *venire*, which was overruled, an objection to the number of peremptory challenges allowed, and other exceptions reserved to the ruling of the court, are sufficiently stated in the opinion.

Gamble and Bricken, and Parks and Parks, for the appellant.

William L. Martin, attorney-general, for the state.

SOMERVILLE, J. 1. It was no ground upon which to quash the *venire* of special jurors summoned for the trial of the defendants that one of those named on the list was a minor under twenty-one years of age, that another was a female instead of a male, that another had been dead for more than a year, that another was a non-resident of the county, or that there was a mistake in the name of still another. These errors made it the duty of the court to direct the names of such disqualified persons to be discarded, and others to be summoned to supply their places, unless, in the opinion of the court, the ends of justice required otherwise: Code 1886, sec. 4322; *Roberts v. State*, 68 Ala. 515; *Fields v. State*, 52 Ala. 348; *Jackson v. State*, 76 Ala. 26.

2. Under the act approved February 28, 1889 (Acts 1888-89, pp. 77-79), a single defendant who is on trial alone for a capital offense is entitled to twenty-one peremptory challenges. It is further declared as follows, in section 2 of the same law: "When two or more defendants are on trial jointly for a capital offense, or other felony, each defendant shall be entitled to one half of the peremptory challenges allowed by this act." In this case, one of the defendants was allowed eleven peremptory challenges, and the other ten. This was a compliance with the statute, as nearly as was practicable, the personality of jurors not being capable of enumeration by vulgar fractions.

3. The defendants were permitted to prove their good character for peace in the neighborhood in which they resided, which was clearly relevant to the issues arising on an indictment for murder. There was no effort made by the state to assail their character for truth and veracity, although they testified as witnesses in their own behalf. The court properly ruled that the evidence introduced as to good character for peace and quiet could not be looked to for the purpose of sustaining the credibility of the parties as witnesses: *Morgan v. State*, 88 Ala. 223.

4. The law of self-defense was clearly and accurately stated to the jury in the general charge of the court, and in terms substantially enunciated in the past decisions of this court: *Storey v. State*, 71 Ala. 329; *De Arman v. State*, 71 Ala. 351. This charge must be construed as a whole, in connection with the evidence, and not in disconnected parts, or by garbled extracts: *Williams v. State*, 83 Ala. 68.

5. And among other things, it was correctly asserted, in substance, that, after the intentional killing of the deceased by defendant with a deadly weapon had been proved, the burden rested on the defendant to prove a pressing necessity on his part to take life in self-defense, unless this fact arises out of the evidence produced against him to prove the homicide. The *onus*, therefore, rests on the defendant, in such case, to show that he could not safely retreat without apparently increasing his peril. This must be so, for the inability to safely retreat is one of the elements of fact which enters into and creates the necessity to kill: *Carter v. State*, 82 Ala. 13. If there be a safe mode of successful retreat, there can be no necessity to kill, unless the appearances surrounding the defendant reasonably indicate the contrary: Wharton's *Crim. Ev.*, 8th ed., sec. 334; *Commonwealth v. Webster*, 5 Cush. 295; 52 Am. Dec. 711. The rule as to the *onus* of proof on this point is stated, in accordance with the above view, in *Cleveland v. State*, 86 Ala. 2, which is of later authority than *Brown v. State*, 83 Ala. 33, 3 Am. St. Rep. 685, where the contrary rule seems to be asserted. We believe the doctrine of Cleveland's case to be correct, and adhere to it: *Lewis v. State*, 88 Ala. 11.

6. The burden was on the state, however, to show that the defendants were in fault in bringing on or provoking the difficulty; not on the defendants to prove that they did not provoke it: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685; *McDaniel v. State*, 76 Ala. 1.

7. There was no error in that portion of the charge which asserts that the use of a deadly weapon, in cases of homicide, raises the presumption of malice, unless such presumption is repelled by the evidence which proves the killing: *Sylvester v. State*, 72 Ala. 201.

8. It was unquestionably the law, as charged by the court, that if the defendant Ben Gibson sought the difficulty with the deceased for the purpose of chastising or beating him, on account of the alleged abuse of defendants' father, or other

like reason, and in pursuance of such purpose, armed himself with a pistol, to be used in the event it became necessary, and he did use it, and killed deceased with the weapon, pursuant to such purpose, then this would be murder, although it was necessary to use the pistol in order to save his own life, or his body from great harm: *Ex parte Nettles*, 58 Ala. 268.

9. There was evidence tending to show a conspiracy on the part of the defendants to attack the deceased, — circumstances from which the jury were authorized to infer a common design, at least, to assault and beat him. Each would therefore be criminally responsible for the acts of the other in prosecution of the design for which they combined; i. e., for everything done by the confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. The law on this subject is fully discussed in *Williams v. State*, 81 Ala. 1; 60 Am. Rep. 133; and in *Martin v. State*, 89 Ala. 115; *ante* p. 91.

The charges of the court seem to conform to the principles declared in these decisions: *Amos v. State*, 83 Ala. 1; 3 Am. St. Rep. 682.

10. It was unnecessary to prove any express agreement on the part of the defendants to attack the deceased, or to kill him. An implied understanding, established by circumstantial evidence, would be sufficient. And the presence of one of the defendants, aiding, abetting, and encouraging the other in making an attack on the deceased, might justify the jury in holding him criminally responsible for the homicide which resulted in the death of the party assailed: *Williams v. State*, 81 Ala. 2; 60 Am. Rep. 133.

11. Many of the charges requested by the defendants demanded for them an acquittal of every grade of homicide, unless the evidence proved, beyond a reasonable doubt, that the killing was done with malice aforethought, deliberately, willfully, and premeditatedly, which are ingredients only of murder in the first degree. The effect of these charges was to assert that unless defendants were convicted of murder in the first degree, they could not be convicted of any lower grade of homicide. These charges were obviously erroneous, and their refusal was without error.

12. We have examined all the charges in the record, — those

given by the court, as well as those refused on request of the defendant. None of them are numbered, or otherwise identified, except by pencil-marks, apparently made by counsel. This leads to embarrassment in their discussion, and should be obviated on another trial.

13, 14. We discover but one error in any of these numerous rulings. The following charge, requested by the defendants, is supported by their own testimony rendered on the trial, which tends not only to reduce the grade of homicide, but to make out a case of self-defense: "The court charges the jury that if they are reasonably satisfied, from all the evidence in this case, that the defendant, Ben Gibson, was really, or to ordinary appearances, in imminent peril to his life or limb, from which there was no reasonable means of escape, and that he neither provoked nor encouraged the difficulty, and under this reasonable apprehension the defendant fired the fatal shot, and that he did not fire the fatal shot of malice, then they should not find the defendant guilty of murder in either degree." There can be no murder in either degree without malice. The most culpable phase of homicide without the element of malice is voluntary manslaughter. The charge does not demand an entire acquittal of all criminal responsibility for the act done, but a reduction of the verdict to a finding for manslaughter. The testimony of the defendants themselves tended to support every phase of the instruction requested. It mattered not that this testimony may have sprung from parties deeply interested, and have been contradicted by many disinterested witnesses, so as to be entitled to but little weight in the estimation of the trial judge. It was for the jury, and not the court, to pass on the credibility of the witnesses and the sufficiency of the evidence. Every prisoner at the bar is entitled to have charges given which, without being misleading, correctly state the law of his case, and are supported by any evidence, however weak, insufficient, or doubtful in credibility. The charge under consideration was a correct enunciation of the law, and being supported by the evidence, its refusal must operate to reverse the judgment of conviction: *McDaniel v. State*, 76 Ala. 1.

The other rulings of the court seem to us to be free from error.

The judgment is reversed, and the cause remanded for a new trial. In the mean while, the prisoners will be retained in custody until discharged by due process of law.

CRIMINAL LAW — HOMICIDE — BURDEN OF PROOF AS TO SELF-DEFENSE. — The law presumes an intentional killing with a deadly weapon to be murder, and it devolves upon the defendant to repel such presumption when he claims to have acted in self-defense: *State v. Elliott*, 96 Mo. 151; *Lewis v. State*, 88 Ala. 11; *People v. Elliott*, 80 Cal. 297; *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685. But he need not repel such presumption by a preponderance of evidence: *People v. Boling*, 83 Cal. 380; nor beyond a reasonable doubt: *People v. Riordan*, 117 N. Y. 71. In some states, the rule is, that the *onus probandi* never shifts from the prosecution, even when the plea of self-defense is set up: *People v. Lanagan*, 81 Cal. 142; *People v. Coughlin*, 65 Mich. 704; *State v. Donahoe*, 78 Iowa, 486. But having proved self-defense, the prosecution must always prove that defendant was the provoker of the difficulty, where it seeks to thus overcome the effect of the plea of self-defense: *Cleveland v. State*, 86 Ala. 1.

CRIMINAL LAW — HOMICIDE — PLEA OF SELF-DEFENSE, WHEN NOT SUFFICIENT. — Where a defendant provoked the difficulty, or willingly entered into the fight, he cannot set up self-defense in justification of the killing: *Lewis v. State*, 88 Ala. 11; *Parker v. State*, 88 Ala. 5; *Rutledge v. State*, 88 Ala. 85; *Rays v. State*, 88 Ala. 92; *State v. Scott*, 41 Minn. 366; *Bolzer v. People*, 129 Ill. 112. But an exception to this rule is, that when the provoker withdraws from the difficulty, after having provoked it, and announces his desire for peace, and he is pursued by his adversary, his right to self-defense revives: *Parker v. State*, 88 Ala. 4.

CRIMINAL LAW — HOMICIDE — DUTY TO RETREAT. — An assailed person must retreat, if possible, rather than take the life of his assailant: *Brown v. State*, 83 Ala. 33; 3 Am. St. Rep. 685; *Blackburn v. State*, 86 Ala. 595; *Poe v. State*, 87 Ala. 65. But one need not retreat when attacked in his own dwelling-house: *Brinkley v. State*, 89 Ala. 34; *ante*, p. 87; or where, by retreating, he increases his peril: *Shell v. State*, 88 Ala. 14; *Rutledge v. State*, 88 Ala. 85; note to *People v. Lennon*, 15 Am. St. Rep. 263.

CRIMINAL LAW — CONSPIRACY. — As to the liability of conspirators, see *Martin v. State*, 89 Ala. 115; *ante*, p. 91, and note.

CRIMINAL LAW — CONSPIRACY. — As to the evidence necessary to prove a conspiracy, see *Martin v. State*, 89 Ala. 115; *ante*, p. 91, and note.

HOMICIDE — MANSLAUGHTER IS DISTINGUISHED FROM MURDER, in a note to *State v. Dorsey*, 10 Am. St. Rep. 113, 114.

EX PARTE WALTER BROTHERS.

[89 ALABAMA, 237.]

REVERSED JUDGMENT — RESTITUTION. — Money paid on a decree of court is not paid voluntarily, and upon its reversal, the party paying the money is entitled to restitution, regardless of the final determination of the rights of the parties.

MANDAMUS TO CHANCELLOR. — *Mandamus* will lie against a chancellor to compel him to make an order of restitution of money paid under his decree which has subsequently been reversed.

APPLICATION for a writ of *mandamus* directed to the chancellor of the chancery court at Montgomery, commanding him to make, or to show cause why he should not make, an order of restitution in a cause pending in his court, requiring one May, the plaintiff in the original suit, to repay to Walter Brothers, defendants therein, a sum of money which they had paid into court under a decree against them in such suit, which was afterwards reversed by this court on appeal. After such reversal, said chancellor refused to make an order of restitution in said cause.

Brickell, Semple, and Gunter, for the appellant.

Roquemore, White, and McKenzie, for the respondent.

MCCLELLAN, J. We are unable to concur with counsel who appear against the application, that money paid on and in obedience to a decree of the chancery court can, in any case, be said to be paid voluntarily, in such sort as to preclude its recovery in the event of a reversal of the decree. We understand the law to be settled to the contrary: *Cahaba v. Burnett*, 34 Ala. 400, 407; *Knox v. Abercrombie*, 11 Ala. 997; *Connecticut Mut. Life Ins. Co. v. Stewart*, 95 Ind. 588; *Wright v. Aldrich*, 60 N. H. 161; *Hollingsworth v. Stone*, 90 Ind. 244; *Scholey v. Halsey*, 72 N. Y. 578; *Hiler v. Hiler*, 35 Ohio St. 645.

We can conceive of no case in which a party who pays money on a decree which is subsequently reversed is not entitled to have restitution of what he has paid, and to be thus reinstated in the position and to all the rights he had prior to the rendition of the erroneous decree. It is not material what those rights were, or would probably, or even certainly and necessarily, be determined to be, in the further progress of the litigation. He is entitled to have his final equities adjudicated while he yet occupies whatever vantage-ground was his in the inception of the contest, and from that stand-point to invoke the judgment of the law on the issues he presents. When he

asks, after the reversal of a decree which has erroneously adjudged his rights, and disturbed his relations in the case, to have his original *status* restored, it is no answer to his petition to say that, on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution. To so hold would be to prejudge the case, to decide in advance of the submission of the issues on pleading and proof that the party, who has been put at a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the cause. On the other hand, we are unable to see any predicate for the claim of the other party to retain what, confessedly, he has wrongfully received. He had no right to the money involved in the litigation, in contemplation of law, until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He therefore proceeds with the cause, having an undue advantage of his adversary, and is in fact in the attitude of having gained what he claimed before his right to it had, or could have been, determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand, and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties: Freeman on Judgments, sec. 482; Freeman on Executions, sec. 347; *Bank of United States v. Bank of Washington*, 6 Pet. 16, 17; *Marks v. Cowles*, 61 Ala. 303.

This case is clearly distinguishable from *McCreeliss v. Hinkle*, 17 Ala. 459, and *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296, in which the question arose on a motion to dismiss the appeals taken by the parties, who had received satisfaction of decrees in their favor from which the appeals were taken. There had been no ascertainment that the decrees were erroneous. They had not been reversed. It did not appear but that under those decrees the parties would be entitled to all they had received, and hence the court declined to dismiss the appeals, and proceeded to hear them on their merits. Here there is no decree. The judgment of reversal has expunged it. And the rights of the parties are similar to those passed on in the cases of *Hall v. Hrabrowski*, 9 Ala. 278, and *Bradford v. Bush*, 10 Ala. 274.

That the chancellor before whom the case is pending has the power to make an order for restitution in such case is not controverted. The parties are before him, and in and about,

and in the conduct of that cause, they are subject to his control. The facts which constitute the only predicate for such an order—a decree, payment under it, and its reversal—are a part of the cause itself. There can be no dispute or mistake about them. On them the order for restitution goes as a matter of course. It does not involve the exercise of judicial functions. There is no remedy for the refusal to grant the order, except *mandamus*. Our opinion is, that *mandamus* is the proper remedy. And the writ will be awarded in this case, to be issued only on the further application of petitioner's counsel, if restitution, or an order therefor, is not made in the court below upon advice of our conclusion.

REVERSAL OF JUDGMENT, EFFECT OF. — The right of a party to restitution after the reversal of a judgment under which he was compelled to pay money is discussed at length in a note to *Chung v. Launeister*, 17 Am. St. Rep. 264—266.

NORTH BIRMINGHAM STREET RAILWAY COMPANY v. CALDERWOOD.

[89 ALABAMA, 247.]

CONTRIBUTORY NEGLIGENCE — VARIANCE BETWEEN PLEADINGS AND PROOF.

— Where a city ordinance prohibits street-cars moving westward from stopping on the east side of the street, and those moving eastward from stopping on the west side of the street, either to receive or deliver passengers, and requires the cars to cross the street before stopping, a passenger moving westward, who claims damages for an injury received from being thrown from the cars while in motion, through the failure of the defendant to stop them a sufficient length of time to enable him to alight in safety on the west side of the street, cannot recover, in the absence of negligence on the part of defendant, when the proof shows that the injury complained of was received on the east side of the street.

CONTRIBUTORY NEGLIGENCE IS DEFENSIVE MATTER, and the burden of establishing it is ordinarily on the defendant. This rule does not apply when plaintiff's testimony, which seeks to fix negligence on the defendant, inculpates himself also.

CONTRIBUTORY NEGLIGENCE CANNOT BE INVOKED AS A DEFENSE unless it is a proximate cause of the injury. Still, it need not be the sole cause, as it is sufficient if it is one of two or more concurring efficient causes.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT. — In an action against a street-car company to recover damages for injuries arising through its negligence, when it becomes a material issue whether the cars stopped on the east or the west side of the street, and the evidence on this question is conflicting, it should be left to the jury to determine, without any instructions to the effect that it is presumed that the cars stopped on the west side of the street, where, under an ordinance, they were required to stop.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT. — Where, in an action against a street-car company, its negligence is alleged, and the evidence shows that plaintiff's injury was received while attempting to alight from the defendant's car, but is conflicting as to which side of the street the car was stopped at the time, the defendant being required by law to stop only on a certain side, and the evidence further showing that the conductor was not in his place at the time, and that the car stopped on the street in apparent response to the pulling of the bell-cord by plaintiff, who, reasonably believing that the stop was made to allow him to alight, attempted to do so, the question of his contributory negligence is one of fact to be determined by the jury.

NOTICE OF MUNICIPAL ORDINANCE. — Any person within a municipality who contracts, even by implication, with reference to a matter governed by its ordinance operating as a police regulation, is charged with notice of the provisions of such ordinance.

ACTION for damages by a passenger for personal injuries. The facts are sufficiently stated in the opinion. The court, against the objections and exceptions of defendant, charged the jury as follows: 2. "Contributory negligence on the part of the plaintiff, to avail as a defense in this action, must be the proximate cause of the injury; and if it is not the proximate cause of the injury, it cannot be invoked as a defense." 3. "The burden of proof establishing contributory negligence rests on the defendant." 4. If the jury believed, from the evidence, that, on the day named, plaintiff was a passenger on the defendant's cars, "and that the train stopped on First Avenue, near Twentieth Street, for the purpose of letting the passengers get off, and the testimony leaves it uncertain whether it stopped on the east or on the west side, then the jury would have the right to infer and indulge the presumption that it stopped on that side where the city ordinance and the rules of the company required it to stop, and not on that side where it was forbidden to stop." 5. If the jury believe, from the evidence, that, on the day named, "the defendant's train came to a full stop on First Avenue, near Twentieth Street, on the west side thereof, and that this was the place at which the trains usually stop for letting off passengers, and that passengers on the train, including plaintiff, desired to get off, then it was defendant's duty to stop the train, at that time and place, a sufficient length of time to allow the passengers to alight from the train; and if they further believe, from the evidence, that plaintiff immediately started to get off, and continued, with due and reasonable care, to get off after she started, and the train suddenly moved forward, without allowing sufficient time for her to get off, and threw

her to the ground with such force as to cause a severe and painful injury, without fault or negligence on her part, this is an act of negligence on the part of the defendant which will sustain an action; and if the jury further believe, from the evidence, that by reason of the negligence of the defendant in thus moving forward its train, and without fault or negligence on the part of the plaintiff, she received a severe and painful injury, and has suffered great mental and physical pain, and that said injury is permanent, and that she has suffered great mental and physical pain as the proximate cause thereof, then they may find for the plaintiff for such amount of damages as the proof may show she ought to receive." The defendant asked for certain instructions, which were refused, and exceptions reserved. The only one of these mentioned in the opinion is sufficiently stated therein.

Garrett and Underwood, for the appellant.

A. Y. Harper and R. G. Cobb, for the respondent.

SOMERVILLE, J. The action is brought for an injury received by the plaintiff in stepping from the train of the defendant's street-railroad, which was operated by a steam dummy-engine, in the city of Birmingham. The verdict of the jury was for the plaintiff, in the sum of five thousand dollars damages. The alleged negligence of the defendant, as averred in the complaint, was the failure of the engineer of the train to stop a sufficient length of time to enable the plaintiff to safely alight on the west side of Twentieth Street, where trains were accustomed to stop to deliver passengers.

1. The defendant, in the eighth charge, requested the court to instruct the jury that if they believed, from the evidence, that the damage complained of was received on the east side of said street, then, under the allegations of the complaint, the jury must find for the defendant; in other words, that there would be a fatal variance between the allegations and the proof.

We think, under the facts of the case, the place of stopping was material, and that the court erred in not giving the charge. It was shown, by the evidence, that a municipal ordinance of the city regulating the running and stopping of street-cars required each stop to be made just beyond the far crossing from the car, or dummy-engine, "so as to clear the street or avenue from the sidewalk," and prohibited a violation of this regulation under a penalty as a misdemeanor. The ordinance

thus prohibited trains to stop on the east side of streets when moving westward, or on the west side when moving eastward, either to receive or deliver passengers. They were required to cross the street before coming to a stop. And the evidence shows this was the custom of the company, except in cases of necessity, to avoid accident, or collision with vehicles or pedestrians.

The train, in this case, was moving westward at the time of the accident. The lawful stopping-place, therefore, was on the west side of Twentieth Street. It was unlawful to stop on the east side for the purpose of allowing a passenger to alight.

The contract of the defendant with the plaintiff, as a passenger on its cars, must necessarily imply an agreement to stop on the west and not on the east side. The duties therefore imposed by law on the defendant's servants were materially different at the two places. At the lawful stopping-place they were compelled to stop to deliver the plaintiff, on receiving proper notice of her desire to stop, or show some lawful excuse for their failure to do so. This stop was required to be for a time reasonably sufficient to enable her to conveniently alight: *Central R. R. etc. Co. v. Miles*, 88 Ala. 256. And the duty of keeping a diligent look-out rested on the engineer and conductor, to see that a premature start of the train, such as might endanger her safety, should not be negligently made. No such duties were required at a place where it was unlawful to stop for the purpose of delivering passengers, unless those in charge of the train elected to stop, in violation of law, and thereby induced the plaintiff to alight. In such case, on being informed of her presence and desire, they would presumptively be chargeable with negligence if they failed to stop for a time reasonably sufficient to permit a safe exit from the train.

The case of *Western R'y etc. Co. v. Sistrunk*, 85 Ala. 352, is distinguishable from this case, on the obvious ground that the alleged variance of place there was immaterial, the duties of the defendant to the plaintiff being precisely identical at each.

For the error of refusing this charge, the judgment of the city court must be reversed.

2. Contributory negligence is defensive matter, and the burden of establishing it is ordinarily cast on the defendant; but this is not a correct proposition, where the plaintiff's own testimony, which seeks to fix negligence on the defendant, inculpates himself also, as it tends to do in this case: *Savannah*

etc. R. R. Co. v. Shearer, 58 Ala. 672. Or to state the proposition otherwise: "When the plaintiff shows negligence on part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant to show that the plaintiff was guilty of negligence": *Cassidy v. Angell*, 12 R. I. 447; 34 Am. Rep. 690; Wharton on Negligence, secs. 423-425. The third charge requested by the plaintiff should not have been given.

3. So the second charge would have been less liable to mislead, if it had asserted that contributory negligence cannot be invoked as a defense, unless it is a proximate cause, instead of the proximate cause, of the injury. It need not be the sole cause, but it is sufficient if it be one of two or more concurring efficient causes: *Western R'y etc. Co. v. Sistrunk*, 85 Ala. 352.

4. The fourth charge given for the plaintiff was also erroneous. Whether the train stopped on the west or the east side of the street was a material issue on the trial, and it should have been determined by the jury on the evidence, without reference to any presumption supposed to arise from duty to stop on the west side, which was imposed by the city ordinance.

5. There was some evidence from which the jury, in our judgment, were authorized to infer that the stoppage was on the west side of the street, and the objection to the fifth charge requested by plaintiff, based on this ground, is not tenable. If this instruction had limited the amount of recovery to that claimed in the complaint, we see no error.

6. The question of the plaintiff's alleged contributory negligence was properly left to the jury as a question of fact. We would not, under the evidence, be justified in deciding it adversely to her as a matter of law: *Louisville etc. R. R. Co. v. Perry*, 87 Ala. 392, and cases cited. If the conductor was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by the plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, attempted to do so, the question of her contributory negligence would be one of fact to be properly left to the jury. In this view, all of the defendant's charges, from the first to the fifth, inclusive, and also the seventh, were erroneous, and properly refused. And the fifth charge was misleading, because it excluded the phase of the case last adverted to by us, involving the duties arising from a stoppage at another than lawful station or place for the delivery of passengers.

7. The plaintiff, in our judgment, must be held to know the rule of stopping on the farther side of the street, as prescribed by the city ordinance. "It is well established that the residents within a municipality must take notice of the ordinances, and it is frequently stated that ordinances have the force and effect of laws within the limits of the corporation": *Municipal Police Ordinances*, Horr. & Bemis, 158. This principle seems sound, when applied to any person within a municipality who contracts, even by implication, with reference to such ordinances when operative as police regulations. The contract here, as we have seen, by necessary intendment was, that the delivery of the plaintiff as a passenger was to be at a regular stopping-place, such as would not be violative of any existing and lawful police regulation. This devolved on her the responsibility of informing herself of what we may pronounce an every-day incident of street-railway travel: *Mitchell v. Chicago etc. R'y Co.*, 51 Mich. 236.

The foregoing view is not inconsistent with the principle settled in this state, but denied in many other jurisdictions, that courts will not take judicial notice of municipal by-laws, but require them to be proved as facts: *Case v. Mayor of Mobile*, 30 Ala. 538; *Municipal Police Ordinances*, Horr. & Bemis, 158. Nor with the rule that such an ordinance will not be permitted to create a civil right in favor of a third person, based on the negligence of one failing to obey it: *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603; *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; 74 Am. Dec. 682.

Reversed and remanded.

CONTRIBUTORY NEGLIGENCE — BURDEN OF PROOF. — As to the burden of proof respecting contributory negligence when a passenger is injured, see note to *Farish v. Reigle*, 62 Am. Dec. 686, 687.

CONTRIBUTORY NEGLIGENCE — QUESTION FOR WHOM. — Contributory negligence is ordinarily a question of fact for the jury: *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610, and note; but it may be a question for the court, when there is no dispute as to the facts: *McDonald v. Long Island R. R. Co.*, 116 N. Y. 546; 15 Am. St. Rep. 437; *Seefeld v. Chicago etc. R. R. Co.*, 70 Wis. 216; 5 Am. St. Rep. 168, and note.

JUDICIAL NOTICE — MUNICIPAL ORDINANCES. — Municipal ordinances are not judicially noticed, except in the municipal courts themselves: Note to *Lanfear v. Mestier*, 89 Am. Dec. 668, 669.

GAFFORD v. STRAUSS.

[89 ALABAMA, 288.]

HUSBAND AND WIFE — ADVERSE POSSESSION. — A wife cannot hold real property adversely to her husband, which she claims to have derived from him under a parol agreement of purchase, and on which they continue to reside, and which they jointly occupy as husband and wife, and therefore cannot acquire a prescriptive title thereto which will prevail against the subsequent mortgagee of the husband.

EJECTMENT by S. Strauss against Mrs. Sallie Gafford and H. T. Wimberly. Judgment for plaintiff, and defendants appeal. The opinion states the facts.

J. C. Richardson, for the appellants.

Charles Wilkinson, for the respondent.

CLOPTON, J. Both parties concede that J. M. Gafford was formerly seised and possessed of the land in controversy. Appellee, who was the plaintiff in the circuit court, derives title under a mortgage executed by him February 22, 1873. Defendants do not claim that title ever passed from Gafford to them, or either of them, by any legal conveyance. Their defense is, that Gafford, being indebted to Mrs. Sallie Gafford, who was his wife, for money of her separate estate which he received and used, gave her, in February, 1872, by parol, the lands on which he then lived, including the lands in controversy, in payment thereof, putting her in possession, and that she has been in continuous possession, claiming the land as her own, for the length of time prescribed by the statute of limitations as a bar to the entry of plaintiff. The court having given the affirmative charge in favor of plaintiff, the main inquiry arises, whether, from the undisputed facts, the conclusion of law is, that Mrs. Gafford did not, and could not, have such adverse possession as, by its own mere force, could ripen into a title.

The legal title in the lands, being vested in Gafford when the mortgage was executed, thereby passed to plaintiff. There is no pretense that he had notice of Mrs. Gafford's claim. The possession of the mortgagor thereafter was referable and in subordination to the mortgagee's title, unless rendered adverse by an open and positive disclaimer of his title brought to his knowledge: *Coyle v. Wilkins*, 57 Ala. 108. So long as the mortgagor holds in subserviency to the title of the mortgagee, the possession of his vendee, under a parol contract of sale,

cannot become adverse to the mortgagee, unless there is a disclaimer of the title of the mortgagor, and a holding adversely to him. Counsel invoke the principle pronounced in *Collins v. Johnson*, 57 Ala. 304, and *Vandiveer v. Stickney*, 75 Ala. 227, that an uninterrupted possession of a donee, under a parol gift, or by a vendee under a parol agreement to purchase, when the purchase-money is paid, accompanied by a claim to the lands, is adverse to the donor or vendor, and will be protected by the statute of limitations, maturing into a perfect title, if continuous for the period prescribed by the statute. But to have such effect, the facts essential to constitute an adverse holding must enter into and characterize the possession. The mere assertion of a hostile claim or right, and of possession unaccompanied by adverse actual occupancy, is insufficient.

There is no dispute that Gafford entered into possession of the lands in 1862, and continued in possession, claiming them as his own, until February, 1872, the time of the alleged parol contract of sale. While Mrs. Gafford testifies that she was put into possession at that time, and thereafter claimed the possession and ownership, she also states that there was no change of possession, but she and her husband continued to reside on and occupy the lands, and he controlled them until his death, which occurred in 1882. Ten years not having elapsed after his death before the institution of the action, the bar of the statute can become complete only by tacking her possession, during the continuance of the marital relation, to her possession after the death of her husband. The direct question, then, is, whether the wife can hold premises adversely to her husband, which she claims to have derived from him under a parol agreement of purchase, and on which they continued to reside and jointly occupy as husband and wife. The statement and application of a few elementary principles furnish an answer.

Possession, to be adverse, so as to vest title in the possessor after the lapse of the requisite time, must be not only open, notorious, and continuous, but also exclusive. It must operate to oust or dispossess any other person who may claim title or right of possession. In order to fall within the operation of the statute of limitations, the possession must be sufficiently exclusive to put the dispossessed claimant to his action or entry. This can never be the case where the party having the title is in possession, though it may be joint. Two contemporaneous possessions of the same property, each adverse to the other, is

a legal absurdity not conceivable. Hence when two persons are in possession, claiming under different and hostile rights, the law refers the possession to the party having the title: *Pickett v. Pope*, 74 Ala. 122; *Bragg v. Massie*, 38 Ala. 89; 79 Am. Dec. 82; *Farmer v. Eslava*, 11 Ala. 1028.

It may be that, under the laws in force at the time of the transaction in question, a title would vest in a married woman by the mere force of an uninterrupted possession of real estate for the statutory period under a parol gift or purchase, where the husband never had nor claimed any title, nor interfered with her possession. There is a clear distinction between a possession of that nature, and a possession under a gift or purchase directly from the husband. There being no actual change of possession, the oral agreement between Gafford and his wife was void; it vested no right nor equity, and created no separate estate. It is material only to the extent it may constitute the origin and basis of an adverse possession. Had Gafford executed a conveyance directly to his wife, it would have been inoperative as a transfer of the legal title. Their continuance in joint possession thereafter, for no length of time, could have availed to divest him of the title, and vest it in her. Certainly, a continuance of joint occupancy, without a conveyance, merely under a parol gift, or agreement of purchase, can have no greater effect. The elements essential to an adverse possession, in that sense which can ripen into a title by its own force and the lapse of time, do not, and cannot, exist in such case. The husband is not ousted or dis-seised, actually or constructively; the possession of the wife does not exclude or encroach upon his possession. The possession of Mrs. Gafford during coverture was the possession of her husband, and did not become antagonistic to his rights: *Bell v. Bell*, 37 Ala. 536; 79 Am. Dec. 73; *Hendricks v. Rason*, 53 Mich. 575; 1 Am. & Eng. Ency. of Law, 250. It results that the statute of limitations did not commence to run until the death of her husband.

Affirmed.

TITLE BY ADVERSE POSSESSION AS BETWEEN HUSBAND AND WIFE. — So far as we are able to determine, it seems to have been universally decided in all cases where the question has been involved, with one exception, that a husband cannot hold adversely to his wife, nor the wife hold adversely to the husband, premises of which they are in joint occupancy. The rule, which is supported by the better reason and by the weight of authority, is thus

stated in *Bell v. Bell*, 37 Ala. 536, 542, 79 Am. Dec. 73: "There is a clear distinction between the claim of a separate estate, created in such a manner as to exclude the husband's marital rights, and a naked claim of title in the wife against the husband. A wife may claim that a separate estate was vested in her. She cannot claim that she holds property in possession adversely to her husband, except upon the ground that it is a separate estate; for her possession, except so far as chancery recognizes her right to hold a separate estate, and confers upon her, in reference to such estate, the privileges of a *feme sole*, is the possession of the husband. An adverse possession, or an antagonistic enjoyment, for twenty years, may create the presumption of a title in favor of persons *sui juris*. It never can create the presumption of a title in the wife, clothed with the quality of an exclusion of the husband's marital rights. If the absurdity could be conceived of a wife's holding adversely to her husband, what reason or authority is there to support the position that she thereby not only acquired a title, but a title of such a character as to exclude the husband?" In this case it was decided that the wife's possession could not ripen into a perfect title in her, as against the husband's administrator, though the husband had abandoned her when her possession began, and never after returned to her, nor asserted any claim to the property, and though she held and claimed it as her own for a continuous period of more than twenty years. The case of *Hendricks v. Rason*, 53 Mich. 575, was an action of ejectment, in which the plaintiff claimed title under Minerva Sutliff, to whom her husband, Richard Sutliff, deeded the land in 1857. The defendant claimed under a deed from said Richard to Burritt Sutliff in 1858. The court said: "There was an issue presented to the jury, allowing them to pass upon an adverse possession in Burritt and his line of title. But we find no foundation for any theory that could possibly make out such a claim, except by eking out his period of possession by making his father, Richard Sutliff, an adverse holder against his wife, Minerva, during their married life and family occupancy. This is not within any rule."

In *Mauldin v. Cox*, 67 Cal. 387, it was determined that during coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other, so as to set the statute of limitations in action. The court said: "It would seem more in harmony with our conception of the marital relation to say that while the husband remains the head of the family, that, as to the homestead, his acts of possession and control will be taken as evidence of joint ownership with the wife, and that no presumption of an adverse holding can be indulged or allowed. If he may hold adversely to his wife, her right to the homestead can be determined without her consent, and in a manner different from that contemplated by the code. Her right to maintain an action against him, upon his claiming adversely, will result in ganging her title, not by the certain provisions of the code, but by the more uncertain testimony of witnesses. The acts of the husband in controlling the property, in themselves innocent and proper, will be liable in after years to be tortured into evidence of an adverse possession, where none was originally designed. All necessity for vigilance between husband and wife in guarding their property rights should be, as far as may be, avoided. Again, if the husband can hold the homestead adversely to the wife, then she may maintain ejectment for its recovery, but when restored to possession, her husband may at once rightfully remove her from the premises; or if his adverse possession has ripened into a title, which enables him to prevail in an action, he must continue to keep her

out of possession, or she may again file a declaration of homestead on the property, and start anew on the circle of strife and litigation."

The rule was applied in *Feal v. Robinson*, 70 Ga. 809, where the court decided that the possession of the wife, to be adverse to her husband, must be under written color of title, and actual, public, continuous, peaceable, notorious, and uninterrupted for seven years, to give her title.

The doctrine that there cannot be an adverse holding between husband and wife is affirmed in *Vandervoort v. Gould*, 36 N. Y. 639, where it is determined that the wife may demise her separate estate, although in the occupation of her husband, as his possession cannot be deemed hostile to hers; and where the land of the wife is sold by her husband, the possession is not adverse while the marriage exists: *Stephens v. McCormick*, 5 Bush, 181. Or where the husband rents land of the owner, and moves onto it with his family, in subordination to the owner's title, the wife of the tenant cannot, during coverture, claim the premises adversely the owner so as to set the statute of limitations in operation: *Frink v. Alsip*, 49 Cal. 103. In 1861, Mrs. O. Guerra, a married woman, filed a declaration of homestead upon a tract of land then inclosed and occupied by herself and husband, but which formed a part of a larger tract, owned by her husband and others as tenants in common. From the date of filing the homestead declaration she occupied the land with her husband, claiming it as a homestead, until his death, in 1878, and afterwards by herself until the bringing of this action. After such declaration had been filed, her husband and his co-tenants mortgaged the larger tract, and the mortgagee afterwards became the purchaser at foreclosure sale, and received his deed. Subsequently the interests of the latter in the homestead became vested in Mr. and Mrs. Guerra and one of the co-tenants, and was again mortgaged, foreclosed, and conveyed to the plaintiff.

In an action to quiet title, the court below found that the homestead had been held adversely by her from the date of filing her declaration, but the appellate court reversed this finding, and decided that the filing of the declaration of homestead was invalid, for the reason that the premises were then held in tenancy in common; that title by adverse possession could not avail her, as it was by virtue of her marital relations that she filed her declaration and continued to claim the premises as a homestead. As there was no pretense that her husband claimed adversely to any one, she could not claim adversely to him or those under him, so long as he remained the head of the family: *First Nat. Bank v. Guerra*, 61 Cal. 109.

The rule, however, is announced in *Clark v. Gilbert*, 39 Conn. 94, that a married woman, to whom possession of land is delivered under a parol gift, and who occupies the land uninterruptedly, adversely, and exclusively for fifteen years as her own, thereby acquires a complete title in herself, subject to an estate by curtesy in her husband, if the husband, though living with the wife, claims no independent, exclusive occupation in himself.

ANONYMOUS.

[39 ALABAMA, 391.]

DIVORCE FOR MALFORMATION. — Before the wife can be granted a divorce on the ground that her husband is physically incapacitated from entering into the marriage state by reason of his malformation and abnormal proportions, the proof should be satisfactory, and as direct as the nature of the question is susceptible of. The wife must submit to a skilled examination of her person, under order of court, to show that the fault is not with her; and the husband must also submit to such an examination, that the court may be satisfied that the proceeding is not consensive and collusive. Finding the latter to be the case, relief should be denied, except on clear proof of the charge preferred in the bill.

BILL for divorce, on the part of the wife, on the ground that the abnormal size of certain of her husband's parts prevented the consummation of the act of sexual intercourse between them.

Richardson and Steiner, for the appellant.

Charles Wilkinson, for the respondent.

STONE, C. J. The averments of the bill in this case are too offensive to modesty to allow their publication in our reports. But as said by Lord Stowell in *Briggs v. Morgan*, 3 Phillim. 325, 1 Ecc. Rep. 408, "courts of law are not invested with the powers of selection. They must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender. Here the claim is for a remedy, and the court cannot refuse to entertain it on any fastidious notions of its own."

Our statute (Code of 1886, sec. 2322) declares that either party to a marriage is entitled to a divorce from the bonds of matrimony, "when the other was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state." The meaning of the words "physically incapacitated," as here used, is substantially the same as that of the word "impotent," frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate the marriage. Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation. Copulation or coition — the act of gratifying sexual desire — is the consummation of marriage, inability to accomplish which, when it

proceeds from incurable physical imperfection or malformation, is precisely what our statute means and expresses by the words "physically and incurably incapacitated." Barrenness, however, is in no sense the synonym of impotency. We consider it unnecessary, at this stage of this case, to go into further details. 1 Bishop on Marriage and Divorce, 6th ed., sections 322-338 a, inclusive, treats the subject at length, and collates and reviews the adjudged cases. We approve his statement of the American doctrine, as set forth in said sections: Note to *Devanbagh v. Devanbagh*, 28 Am. Dec. 443.

The chancellor overruled the defendant's demurrer, and his motion to dismiss the bill for want of equity; and the present appeal by the defendant is from this ruling. It is here contended that, before seeking a divorce, complainant should have submitted to the triennial test, sometimes required in the English ecclesiastical court. That being a rule of the canon and not of the common law, it is doubtful if it could exert any influence in our deliberations, even if uninfluenced by statute. We think, however, that our statute forbids us to consider that rule in passing on this statutory ground of divorce.

It is contended for appellant that the averments in the present bill are not sufficiently specific. We think there is nothing in this, for very obvious reasons. We know not how the charges could be made more definite.

Questions are raised on the form of relief, and on the right to allow the amendment to the bill, which was made in the court below. There is nothing in these objections. However, a sentence annulling marriage on account of impotency may have been classified or regarded under the canon law, such marriages were not absolutely void. They were only voidable, at the request of the injured party. If not annulled by judicial sentence during the life of the parties, they entailed all the legal consequences of a valid marriage; and until such sentence of annulment, neither party could contract other marriage. But we need not pursue this inquiry. Our statute, in terms, makes it a ground for divorce from the bonds of matrimony, and that fixes its class and *status* for us.

Is the malformation or physical incapacity charged in the bill, if true, sufficient ground for divorce? Can we, as matter of law, or of indisputable fact, affirm that the charge is preposterous, and therefore untrue? Are the abnormal proportions, which are charged, impossible, in the nature of things? We

know of no rule of law or logic by which we can reach such conclusion. We hold that the chancellor, in his decretal order overruling the demurrer, and refusing to dismiss the bill, did not err.

The briefs of counsel give evidence of diligent research, and they furnish no adjudged case in which the malformation here complained of was the ground of complaint. We suppose such cases, if they exist at all, are very rare. To authorize the relief prayed, the proof should be very satisfactory, and the most direct which the nature of the question is susceptible of. The complainant must be required to submit her person to examination by physicians, or matrons skilled in such matters, to be appointed by the chancellor; and proof of such examination, by the persons so appointed, showing that the fault is not with her, must be made an indispensable condition of relief. If she refuse to submit to such examination, then let her bill be dismissed.

The defendant also should submit to a skillful examination, as a condition of his defense, if he contests the complainant's right to relief. But if defense is not made as herein indicated, the chancellor should scrutinize the testimony narrowly, and have recourse to any other legal means, with a view of ascertaining if the proceedings have not become consensive and collusive. Finding such to be the case, relief should be denied, except on clear proof of the charge preferred in the bill, namely, that, for the reason stated, the defendant "was, at the time of the marriage, physically and incurably incapacitated from entering into the marriage state."

Affirmed.

MARRIAGE AND DIVORCE — Physical incapacity as a ground for divorce is thoroughly discussed in an extended note to *Devanbagh v. Devanbagh*, 28 Am. Dec. 447-451.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY v. THOMAS AND SONS.

[89 ALABAMA, 294.]

COMMON CARRIER — DUTY TO DELIVER TO CONNECTING LINE. — Where a common carrier receives goods consigned beyond the terminus of its own line, with an agreement to deliver to a connecting line, the contract of shipment imposes not only the duty to transport safely over its own road, but also to safely deliver to the next connecting carrier.

COMMON CARRIER — DUTY TO DELIVER TO CONNECTING LINE. — The carrier's liability, if he has undertaken to carry goods beyond his own line, does not terminate upon the arrival of the goods at his own terminal depot, but continues when there is a further duty to carry over an intermediate short line belonging to it, and connecting with the connecting road, in order to complete the act of delivery to the connecting carrier.

COMMON CARRIER — LIABILITY OVER CONNECTING LINE. — A carrier, in undertaking to forward goods beyond the terminus of its own route, is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract of shipment; and if it disregard such instructions, and the goods are lost by this act of negligence, it is liable for their value, though the loss occurs while they are in the possession of another carrier or person.

COMMON CARRIER — LIMITATION OF LIABILITY BY CONTRACT. — A carrier cannot limit his liability by contract, so as to evade responsibility for injuries which may occur through the negligence of his servants. Such contract is contrary to public policy.

COMMON CARRIER — LIABILITY. — The liability of a common carrier, except so far as lawfully limited by special contract, is that of an insurer against all losses, except those occasioned by the act of God, the public enemy, or the contributory negligence of the consignor.

COMMON CARRIER — LIABILITY OVER CONNECTING LINE AS FORWARDER. — In so far as a carrier acts as a mere forwarder, assuming as agent of the consignor to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care, or such care as persons of ordinary prudence exercise in reference to their own property under like circumstances.

COMMON CARRIER — BILL OF LADING, CONSTRUCTION OF. — In construing a bill of lading given by the carrier for the safe transportation and delivery of goods shipped by a consignor, the contract will be construed most strongly against the carrier, and favorably to the consignor, in case of doubt in any matter of construction.

COMMON CARRIER — LIABILITY FOR SAFE DELIVERY OF LIVE-STOCK TO CONNECTING LINE. — Where a carrier has contracted to carry live-stock over his own road and deliver them to a connecting carrier, it is his duty, after the transit on his own road is completed, and the stock transferred to cars accepted by the shipper preparatory to delivery to the connecting line, to either permit the consignor to put such cars in proper condition to safely transport the stock, as he had agreed to do, or himself perform this duty with reasonable care and diligence; and for a failure so to do, the carrier is liable for a resulting injury to the stock. This duty includes the providing of suitable bedding for the cars, partitions to keep the cattle apart, and the exercise of proper care to prevent crowding of the stock in the cars.

COMMON CARRIERS — DELIVERY OF LIVE-STOCK TO CONNECTING CARRIER — EVIDENCE TO EXCUSE CONSIGNOR'S LIABILITY. — In an action against a carrier on the contract of carriage, to recover for injuries to live-stock arising from negligence in delivery to a connecting carrier, evidence showing an offer on the part of the consignor to perform all the duties imposed upon him by the contract is admissible.

COMMON CARRIERS — JURISDICTION IN ACTIONS AGAINST. — An action may be maintained against a domestic corporation in the state of its incorporation, under a contract made in that state, to recover for injuries to live-stock transported over its road, though such injury occurred at its terminus in another state.

PRACTICE — AMENDMENT OF COMPLAINT — STATUTE OF LIMITATIONS. — In an action against a carrier on a contract of carriage to recover for injuries to live-stock arising from negligence in delivery to a connecting carrier, amendments to the complaint correcting a misdescription of the contract as to the agreed point of destination, or otherwise curing an imperfect statement of the same subject-matter, or adding new averments of facts more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the carrier has violated his duties growing out of his agreement embraced in the contract, should be allowed, and are not subject to the bar of the statute of limitations, if the action was commenced within the time designated by the statute.

ACTION against a common carrier to recover damages for injury to live-stock while in transportation. The facts are stated in the opinion, except the testimony of one of the plaintiffs in the court below, which was as follows: That the cattle in question were carried in good order to defendant's terminus at Meridian; that he there saw defendant's depot agent, Reeder, and asked him if he was going to transfer the stock to other cars for transportation over the connecting road, and told him if the stock was to be reloaded in other cars, he wanted to attend to the matter himself. Reeder told him that the stock would not be unloaded, but that he would change the trucks on the same cars so as to make them fit the track of the connecting road. Witness stated that he then went to supper, and upon his return found that the stock had been put into other cars, and upon asking Reeder why this was done, he received the reply that trucks to fit the connecting road could not be obtained, and for this reason the stock was transferred to cars furnished by the latter road. He then told Reeder that if any damage resulted to the stock he would hold the contracting carrier liable. He also testified that he then inspected the cars and found them crowded and not properly loaded, bedded, or partitioned; that he tried to remedy these defects, but could not, for want of material. This evidence was admitted over the objection and exception

of defendant. The defendant asked for the following instructions, referred to in the opinion. They were refused, and exceptions reserved: 1. "If the cattle were properly carried from Epes's station to Meridian, then, though there may have been negligence on the part of defendant's servants in forwarding them from Meridian by the connecting carrier, such negligence would not entitle plaintiffs to recover in this action"; 2. "Under the contract in this case, the defendant is not liable for the manner in which the cattle were loaded in the cars for shipment from Meridian on the Mobile and Ohio railroad, nor for the character of the cars furnished by said Mobile and Ohio road for their shipment"; 3. "The liability of defendant as common carrier ceased when it safely carried the cattle to Meridian, and for its acts in forwarding them from Meridian it is liable only as an agent of the shipper, which liability cannot be enforced in this action"; 4. "Plaintiffs' counsel insists that under the contract it was the duty of Thomas to unload and load at Meridian, and that Reeder, as defendant's agent, had it done against the protest of Thomas, and upon his own promise not to have it done, and in the absence of Thomas, and without his knowledge. The court charges you that if such were the duties of Thomas, and he was prevented from discharging them by Reeder as such agent, then defendant is not responsible in this action for the acts of Reeder in that regard"; 5. "The evidence in this case shows that the negligence complained of was done in forwarding the cattle from Meridian, and not as a carrier under the contract." Judgment for plaintiff, and defendant appeals.

Judge and De Graffenreid, for the appellant.

Altman and Patton, for the respondents.

SOMERVILLE, J. The suit is for damages claimed by the owner and shipper of certain cattle, for injury to the animals, which is alleged to have been the result of the defendant's negligence, growing out of a violation of duty imposed by the contract of shipment. The agreement of the railroad was to receive the cattle at Epes's station, in this state, and to transport them to Meridian, each of these points being on its own line, and as agent of the shipper, to forward the animals from the latter place to New Orleans. The shipper agreed to load, unload, and take proper care of the cattle while *in transitu*. The contract also attempts to limit the defendant's liability to injuries caused by "gross or wanton negligence," and to that

of a mere forwarding agent of the shipper in the matter of delivering the cattle to the next connecting line.

The complaint was amended several times, and some questions are raised, both by demurrer and plea, as to the legality of these amendments as properly coming within the *lis pendens*, and the effect of the statute of limitations, which was interposed as a defense to them. Before considering these points, we formulate the following principles, as governing some of the most important issues involved in the case:—

1. Where a railroad or other common carrier receives goods consigned beyond the terminus of its own road, with the agreement to deliver to a connecting line, the contract of shipment imposes not only the duty to transport safely over its own road, but to safely deliver to the next connecting carrier. The duty assumed, in other words, is both to safely carry and to safely deliver: *Wells v. Thomas*, 72 Am. Dec. 228, note 236, 237; *Alabama Gr. So. R. R. Co. v. Thomas*, 83 Ala. 343.

2. In such case, the liability of the first road or carrier does not necessarily terminate with the arrival of the goods at its own terminal depot, although its responsibility as carrier may terminate there, if there is no further duty of carriage in order to make the connection with the other road over which the goods are to be transported. If there be any duty to carry the goods over an intermediate short line, connecting its own terminal depot with the other connecting road, in order to complete the act of delivery, its liability on the intermediate line obviously is that of a carrier, and not of a forwarder, especially if this line be a part of its own road: *Goold v. Chapin*, 20 N. Y. 259; 75 Am. Dec. 398.

3. The carrier, in undertaking to forward goods beyond the terminus of its own route, is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract of shipment; and if he disregard such instructions, and the goods be lost by reason of this act of negligence, he will be liable for their value, although the loss may occur in the possession of another carrier or person: *Johnson v. New York Cent. Trans. Co.*, 33 N. Y. 610; 88 Am. Dec. 416. "If, in forwarding, shipments are made in a manner prohibited by the sender, the carrier so forwarding is liable as an insurer for the safe delivery of the articles so sent": Note to *Johnson v. New York Cent. Trans. Co.*, 88 Am. Dec. 418, and cases cited; *McGhee v. Camden R. R. Co.*, 45 N. Y. 514.

4. The carrier cannot limit his liability so as to evade responsibility for injuries which may occur through the negligence of his own servants, — such contract being deemed contrary to public policy: *Alabama Gr. So. R. R. Co. v. Thomas*, 83 Ala. 843; 3 Brickell's Digest, 119, sec. 39, and cases cited.

5. The liability of a common carrier, except so far as lawfully limited by special contract, is that of an insurer against all losses, except those occasioned by the act of God, the public enemy, or the contributory negligence of the consignor: *Louisville & N. R. R. Co. v. McGuire*, 79 Ala. 395; *Alabama Gr. So. R. R. Co. v. Little*, 71 Ala. 611; *Louisville & N. R. R. Co. v. Sherrod*, 84 Ala. 178.

6. In so far as the carrier acts as a mere forwarder, assuming, as agent of the consignor, to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care, or such care as persons of ordinary prudence exercise in reference to their own property under like circumstances: *Baltimore etc. R. R. Co. v. Schumacker*, 29 Md. 168; 96 Am. Dec. 510; *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211; Story on Bailments, sec. 444.

7. In construing a bill of lading given by the carrier for the safe transportation and delivery of goods shipped by a consignor, the contract will be construed most strongly against the carrier, and favorably to the consignor, in case of doubt in any matter of construction.

8. In the present case, the duty imposed upon the defendant railroad was not only to carry the cattle safely from Epes's station to its depot at Meridian, but to deliver them safely for transportation to the agents of the connecting road. It is immaterial whether the cattle were delivered in the original cars in which they were stored, belonging to defendant's road, or in cars furnished by the connecting road. If the defendant accepted such cars, and had the cattle transferred to them for shipment, preparatory to delivery to the connecting road, the duty devolved on its agents to do one of two things: 1. To permit the consignor, Thomas, to put the cars in proper condition to safely transport the cattle, as he had agreed to do; or 2. To itself perform this duty with reasonable care and diligence. This duty included, as the evidence tends to show, the act of providing suitable bedding for the cars, partitions to keep the cattle apart, and the exercise of proper care in not unduly crowding the animals together in too great numbers in any one car.

The defendant's depot agent at Meridian, Reeder, attended to the matter of transferring the cattle. The Alabama Great Southern railroad, and the Mobile and Ohio railroad, to which the cattle were delivered, connected with each other at a union depot, in the town of Meridian, where the roads intersected or crossed. The freight depots of the two connecting roads were each about a quarter of a mile from the Union depot or crossing. The intermediate line of delivery was therefore a half-mile in length, connecting the two freight depots.

9. The conversation between the plaintiff and Reeder, to which objection was taken by the appellant, was perfectly competent to prove that the plaintiff had used all proper diligence in seeking to perform his part of the shipping contract, as to taking due care of the stock, and that the defendant's agent had relieved him of the duty of bedding cars, and otherwise preparing them for shipping the cattle. That this was within the scope of the agent's authority there can be no doubt. The authority to keep the cattle in the original cars, or transfer them to others furnished by the Mobile and Ohio road, involved, by implication, the duty to put the cars in suitable condition for this transfer, or else to allow the plaintiff to do so under his contract: *East Tennessee etc. R. R. Co. v. Johnston*, 75 Ala. 596; 51 Am. Rep. 489.

The evidence scarcely admits of more than one reasonable inference as to the cause of the injury to the cattle. This injury was obviously the result of the negligent manner in which the cattle were placed in the cars,—the failure to furnish bedding and partitions, and, perhaps, the act of overcrowding the cattle in one of the cars. Such injury was of a kind likely to happen in the ordinary course of things, and was therefore the natural and proximate consequence of the negligence complained of, in the absence of some intervening cause which may have produced it. The duty thus violated by the defendant was the duty to deliver the cattle in a safe condition to be transported by the connecting road,—this having been undertaken by the defendant under circumstances to relieve the plaintiff of such obligation. There was no duty on the connecting road to do more than to transport, and this it did. It was under no liability for failing to take care of the stock during the period of transportation.

The evidence further tends to show that the plaintiff did all in his power to avert the damage which resulted from the negligence in question, and hence no act of contributory negli-

gence can be imputed to him. In this view of the case, all of the charges requested by the defendant were properly refused.

10. This is manifestly not a suit for a tort perpetrated by a foreign corporation in another state, based on a violation of duty growing out of a contract made in such foreign jurisdiction, as was the case of *Central R. R. etc. Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339. The defendant is a domestic corporation, and the contract, made the basis of the alleged breach of duty, was also made in this state. There can be no doubt of the proposition, therefore, that the courts of this state have jurisdiction of the case made by the pleadings and evidence.

11. As to the rulings of the court on the pleadings, we may observe that we discover no error. The various amendments allowed to the complaint do not, in our opinion, introduce a new cause of action different from that stated in the original count of the complaint. The *gravamen* of the action is an injury caused to twelve head of cattle shipped by the plaintiff on the defendant's railroad on April 29, 1886, which injury was alleged to be the result of the defendant's negligence. The several amendments each make a case based on some alleged violation of duty growing out of the undertaking to ship these same cattle. They may correct a misdescription of the contract as to the agreed point of destination of the cattle, or otherwise cure an imperfect statement of the same subject-matter, or add new averments of facts, more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant has violated his duties growing out of the agreement embraced in the bill of lading; but they go no further. The identity of the matter upon which the suit is founded is fully preserved. The amendments all fall within the *lis pendens* proper, and only subserve the purpose of accomplishing substantial justice between the parties, and of deciding the pending controversy on its real and true merits. This is the main design of all statutes allowing amendments to pleadings. The statute of limitations of one year was, for these reasons, no sufficient answer to the new counts added to the complaint by way of amendment: *Alabama Gr. So. R. R. Co. v. Chapman*, 83 Ala. 453; *Stevenson v. Mudgett*, 10 N. H. 388; 34 Am. Dec. 155, and note 158-160; *Dowling v. Blackman*, 70 Ala. 303; *Long v. Patterson*, 51 Ala. 414; *Albright v. Mills*, 86 Ala. 324.

The assignments of error not particularly considered are, in our judgment, not well taken.

We discover no error in the record, and the judgment is affirmed.

CARRIERS OF GOODS—LIMITING LIABILITY BY CONTRACT.—A carrier cannot limit its liability for negligence: Note to *Adams Exp. Co. v. Harris*, 16 Am. St. Rep. 319; *Railway Co. v. Wynn*, 88 Tenn. 320; *Railroad Co. v. Gilbert*, 88 Tenn. 430; *Southern Exp. Co. v. Seide*, 67 Miss. 609.

CONNECTING CARRIERS OF GOODS.—For the duties, rights, and liabilities of connecting carriers of goods, respectively, see note to *Wells v. Thomas*, 72 Am. Dec. 230-247; *St. Louis etc. R'y Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104, and note 117, 118. In the absence of any special agreement, it is the duty of the receiving carrier to safely transport to the end of its own line, and there deliver to the next carrier: *Rickerson etc. Co. v. Grand Rapids etc. R. R. Co.*, 67 Mich. 110. But in *Melbourne v. Louisville etc. R. R. Co.*, 88 Ala. 444, it was decided that a carrier, having safely carried the goods to the point of destination, where the freight charges were paid by the consignee upon inspection of the goods, was under no obligation to transfer the goods to another carrier in the city for ultimate delivery to the consignee at his place of business.

Duty of the receiving carrier and the connecting carrier, respectively, with respect to perishable freight: See *Blodgett v. Abbot*, 72 Wis. 516; 7 Am. St. Rep. 873.

CARRIERS OF LIVE-STOCK—DUTY OF.—Carriers of live-stock must ship them within a reasonable time after they are received: *Cincinnati etc. R'y Co. v. Case*, 122 Ind. 310; and must provide means of transportation, and exercise a degree of care suitable to the nature of the property transported: *Louisville etc. R'y Co. v. Bigger*, 66 Miss. 319; compare *Gulf etc. R'y Co. v. Transick*, 68 Tex. 314, 2 Am. St. Rep. 494, and note as to the liability of a carrier of live-stock, and its power to limit the liability.

CARRIERS OF GOODS—BILLS OF LADING.—For the construction and effect of a bill of lading, see note to *Chandler v. Sprague*, 38 Am. Dec. 407 et seq.

DAVIS v. ROBERT.

[39 ALABAMA, 402.]

CONTRACT—CONSTRUCTION—EVIDENCE OF PARTIES.—The intention of the parties to a written contract must be ascertained from the terms employed, the subject-matter, the attendant circumstances, and the object to be accomplished. The parties cannot testify to their understanding and intention, to aid in the construction.

SPECIFIC PERFORMANCE OF COVENANT FOR DEED IN CONTRACT OF LEASE—CONSIDERATION—MUTUALITY.—A contract of sale in the form of a lease for land for a certain term for a fixed rent, covenanting on the part of the lessor, if the rent is paid at the time fixed, to execute to the lessee "a good and sufficient deed to said land, as a free gift, without any charge or compensation from him," is supported by a valuable consideration as an agreement to convey, is not void for want of mutuality, and

will be specifically enforced, at the request of the lessee or vendee, at the expiration of the term, upon proof of the payment of the rent as agreed upon.

CONTRACT OF SALE IN NATURE OF LEASE—WAIVER OF PROMPT PAYMENT OF RENT.—Under a contract of sale in the nature of a lease for a term, stipulating for the payment of rent at fixed periods, its prompt payment is waived, even if time is of the essence of the contract, by accepting it at other times, either before or after the time fixed upon for its payment.

CONTRACT FOR SALE OF LANDS—TENDER OF DEED BY PURCHASER.—The vendee under a contract for the sale of lands, having performed his part of the contract, need not tender the vendor a deed for his signature thereto, when the latter has denied the vendee's right to a conveyance under the contract.

J. N. Miller, and Cumming and Hibbard, for the appellant.

John Y. Kilpatrick, for the respondent.

CLOPTON, J. By the bill, appellee seeks the specific performance of a contract, of which the following is a copy:—

"I, L. M. Davis, have this day rented to Sylvester Robert the southwest fourth of the southwest fourth of section 16, township 12, range 5 east, lying in Wilcox County, Alabama, for the term of ten years from and after the first day of January, 1879, for which he agrees to pay me an annual rent of fifty dollars, to be paid on the first day of October of each year; and if he pays me the above-named rent at the times agreed on, then I hereby agree to make the said Sylvester Robert a good and sufficient deed to said land, as a free gift, without any charge or compensation from him.

"February 4, 1879.

[Signed] L. M. DAVIS."

The contract was written by defendant, and is admitted. The parties vary as to their understanding and intention, but the testimony as to this was properly disregarded by the chancellor. The intention must be ascertained from the terms employed, the subject-matter, the attendant circumstances, and the object to be accomplished.

The first defense urged to the relief sought by complainant is, that the contract is not a contract of sale, but a lease, and the agreement to make a deed shows by its own terms—"as a free gift, without any charge or compensation"—that it is a voluntary proposition, not founded upon an adequate consideration, and hence its specific execution will not be decreed. This brings for consideration the construction of the contract. What was the real intention of the parties? If the clause under consideration was disconnected from the other parts of the contract, it would clearly appear to be voluntary in

its character; but in determining its meaning, the contract should be considered as an entirety, and the meaning of any part ascertained from its connection with, relation to, and dependency upon the other parts. The contract purports, in terms, to be a lease. Is it a logical sequence that the promise to make a deed on the annual rent being paid as agreed on is voluntary, because included in a contract of lease? A covenant in an agreement of lease by which the lessor agrees that the lessee shall have the option to purchase at a fixed price on or before the expiration of the term is supported by a valuable consideration: *Linn v. McLean*, 85 Ala. 250; *Hawrally v. Warren*, 18 N. J. Eq. 124; 90 Am. Dec. 613. And it is well settled that parties may contract in reference to land with the option of treating it as a sale or lease: *Wilkinson v. Roper*, 74 Ala. 140. There is no legal difficulty in the lessor's stipulating that if a fixed annual rent is paid for a term of years, it shall constitute full payment of the purchase-money, and entitle the lessee to a conveyance. Defendant entered into a contract by which he leased the land for the term of ten years to complainant on his agreement to pay fifty dollars per annum, and inserted therein, and made a part thereof, a stipulation that he would make complainant a good and sufficient deed if the annual payments were made as contracted. This term of the contract is as binding on the defendant as any other term. If not intended to be binding, why was it inserted? The legal effect and operation of the contract are, that it should be considered and treated as a lease, and the annual payments as rent, so long as it continued executory, and on the completion of the payments it should become a perfected sale; in other words, a sale, though in form a lease, conditioned on the prompt payment of the purchase-money in ten annual installments. The words "as a free gift, without any charge or compensation," were inserted to exclude any inference or implication that further or additional purchase-money was to be paid. The agreement to make a good and sufficient deed is founded on a sufficient consideration.

The next defense is want of mutuality. The general rule that, to entitle a party to a specific performance of a contract, there must be mutuality of obligation and remedy, has many exceptions; among which are unilateral contracts or undertakings signed by a single party: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 753. Says Mr.

Pomeroy: "Another most important and comprehensive species of these contracts, unilateral in form, and which can be specifically enforced by the one for whose benefit they are made, although there is no mutuality in the remedy, embraces those in which the consideration is not passed and executed, but future, consisting in acts to be done by the promisee, although the agreements themselves contain no express promise on his part that he will do the acts": Pomeroy on Specific Performance, sec. 169. It is insisted that the contract is signed only by the defendant, and there is no obligation on the part of the complainant. There is undoubtedly mutuality of obligation, although verbal on the part of complainant. There may be mutuality of contract, although the promise on the part of one is in writing signed by him, and verbal on the part of the other, so that the former may be bound to perform, and the latter may avoid the contract: *Oliver v. Alabama G. L. Ins. Co.*, 82 Ala. 417. When an agreement to renew a lease or to convey, at the option of the lessee, forms part of a lease, specific performance will be decreed, though there may be no obligation on the part of the lessee to accept of purchase, and no mutuality of remedy: *Hall v. Center*, 40 Cal. 63. It is not essential in all cases that the contract shall be capable of being enforced against both parties, when entered into; if not so capable as to one, yet if the obligation to perform be mutual, and he has performed his part of the agreement, its specific execution will be decreed.

It is also contended that time is of the essence of the contract, made so by its terms, and that complainant did not make the annual payments at the times agreed on. Ordinarily, the time of performance is not regarded in equity as of the essence of a contract for the sale of lands, but it may be made so by contract. But whether time is of the essence of the contract in this case, it is immaterial to determine; performance at any time may be waived. The receipts of defendant introduced in evidence show that complainant made the annual payments, some before the first day of October, some on that day, and others during that or the succeeding month, except the last which was tendered. Defendant accepted two payments made after the first day of October, and the payments for the succeeding year, which were made before that day, recognizing the contract as subsisting, and thereby waived his right to claim a forfeiture for the failure to make the payments during some of the intervening years

on the day named. It would be inequitable to visit upon complainant, under such circumstances, a forfeiture of his rights under the contract: *Hurst v. Thompson*, 73 Ala. 158; *Stewart v. Cross*, 66 Ala. 22.

The evidence satisfactorily shows that the contract is fair, just, and reasonable, defendant receiving compensation in the amount agreed to be paid as rent, and that complainant has substantially performed his part of the contract, so that as to him it has become executed. The tender of a deed was unnecessary, for it manifestly appears defendant would not have executed it; in fact, he refused to do so, denying complainant's right to a deed.

Affirmed.

CONTRACTS — CONSTRUCTION OF. — As to the construction of written contracts, generally, see *Cravens v. Eagle etc. Co.*, 120 Ind. 6; 16 Am. St. Rep. 298, and particularly note 306.

Where the parties have themselves placed a construction upon a written contract, acted upon such construction, and parted with valuable rights thereunder, courts will enforce the writing as construed by the parties in interest: *Pate v. French*, 122 Ind. 10; *O'Dea v. Winona*, 41 Minn. 424; *Cobb v. McElroy*, 79 Iowa, 603. Still, the language of a written contract, when plain, and not ambiguous, is the only evidence of what the parties intended and understood by it: *West Haven etc. Co. v. Redfield*, 58 Conn. 39; *Ker v. Evershed*, 41 La. Ann. 15; *Williams v. Fletcher*, 129 Ill. 357.

CONTRACTS — SPECIFIC PERFORMANCE. — Mutuality of contract is a prerequisite to a decree of specific performance: *Notes to Publishing Co. v. Telegraph Co.*, 3 Am. St. Rep. 767.

WILDER v. WILDER.

[89 ALABAMA, 414.]

ESTOPPEL AGAINST MARRIED WOMAN — WAIVER OF VENDOR'S LIEN. — A married woman is estopped to enforce a vendor's lien on land constituting her separate estate, sold and conveyed by herself and husband by joint deed in due form, when she and her husband were active in making the sale, and by their declarations and conduct induced a third person to advance to her vendee part of the purchase-money on a first mortgage on the land with the understanding that her lien secured by second mortgage should be waived in favor of such third person.

BILL by Mrs. Savannah Wilder against Sydney T. Wilder and the American Freehold Mortgage Company to establish and enforce a vendor's lien on land, and to have such lien declared superior and paramount to a mortgage executed to said American Freehold Mortgage Company.

Clements and Brewer, for the appellants.

Webb and Tillman, for the respondent.

SOMERVILLE, J. The controlling question in this case involves the doctrine of equitable estoppel or estoppel *in pais* in its application to a married woman, where she appears as a complainant in a court of equity, seeking affirmatively to enforce a right inconsistent with her previous conduct, upon which one of the defendants in the suit has relied and acted. The subject is one in regard to which there is no little conflict of authority, and the magnitude of its importance grows with the changed policy of modern legislation, removing, to a great extent, the iron-clad disabilities of married women imposed by the rules of the common law.

The specific question here involved is, whether a married woman is estopped to enforce a vendor's lien on land sold and conveyed by joint deed of herself and husband in due form prior to the code of 1886, when she and her husband were active in making the sale, and by their declarations and conduct induced a third person to advance to her vendee a part of the purchase-money with the understanding that her lien should be waived in favor of such person. In other words, if she agrees to have secured the unpaid installment of her purchase-money on the land by a second mortgage, subordinate to the first mortgage of a third person, who, on the faith of such superior security, advances the money to her vendee to enable him to pay the first installment to her, can she afterwards repudiate this waiver of her vendor's lien, and enforce it as a prior lien over this other encumbrance, the superiority of which she had admitted, and on the faith of which admission she procured the money? We may add that the transaction is conceded to be governed by the law as it existed under the code of 1876.

This court has uniformly held that the doctrine of estoppel *in pais*, by conduct or admissions, cannot, when unaccompanied by fraud, be invoked against married women so as to preclude them from denying the validity of conveyances of their statutory separate estate which do not conform to the requirements of the statute governing the mode of its alienation. This prescribed mode, under the code of 1876, was by joint deed of husband and wife attested by two witnesses, or acknowledged in due form: Code of 1876, secs. 2707, 2708. The reason upon which these decisions rest is, that the statute

prescribes and restricts the mode of alienation by married women of their separate estates; and to allow title to be conferred by equitable estoppel would introduce a new mode of alienation different from that thus prescribed, and would result in sanctioning indirectly the conveyance by *femes covert* of their property, when they were prohibited by statute from doing directly the same act in the mode attempted: *Canty v. Sanderford*, 37 Ala. 91; *Alexander v. Saulsbury*, 37 Ala. 376; *Drake v. Glover*, 30 Ala. 390; *Harden v. Darwin*, 77 Ala. 472; *Scott v. Battle*, 85 N. C. 194; 39 Am. Rep. 694. So it has been held, in a former decision of this court, that where a husband and wife conveyed, with covenant of warranty, lands to which they had no title, the wife would not be estopped from setting up against the grantee a title to such land afterwards acquired by her: *Gonzales v. Hukil*, 49 Ala. 260; 20 Am. Rep. 282. The act of warranty, being purely contractual, could not operate by estoppel, because a married woman then labored under a legal disability to make such a covenant. But there are decisions of other courts opposed to this view: *Nash v. Spofford*, 10 Met. 192; 43 Am. Dec. 425.

In the case of *Drake v. Glover*, 30 Ala. 390, where the property of the wife was held not to be governed as to its mode of transfer by the statute, because it was not her statutory separate estate, and might therefore be conveyed otherwise than by the joint deed of the husband and wife, it was held that the fraudulent silence of the wife, when her personal property was sold in her presence by her husband, would estop her from afterwards repudiating the sale; but her mere silence, unaccompanied by fraud, would have no such effect.

In *Strong v. Waddell*, 56 Ala. 471, a married woman who had purchased land, and executed, jointly with her husband, a mortgage as security for the payment of the purchase-money, was held to be estopped from denying the title of her vendor, or to interpose her coverture in bar of the foreclosure of the mortgage. The practical effect of such a transaction is, that the vendee takes the property burdened with the mortgage, being an estate on condition, to become absolute only on the payment of the purchase-money: *Marks v. Cowles*, 53 Ala. 499. The estoppel is against claiming the estate and repudiating the encumbrance by which it is burdened.

In *McCaa v. Woolf*, 42 Ala. 389, the doctrine of equitable estoppel was applied to a married woman, so as to preclude her from asserting title to certain personal property, which the

husband, under the rules of the common law, had reduced to possession, and suffered to be sold, and which she, after his death, claimed by right of survivorship.

Mr. Bigelow, in his work on estoppel. page 490, asserts that the weight of reason and authority confines the doctrine, when applied to married women, to cases of "pure tort," and excludes from its operation all cases where the "action sounds in contract."

Mr. Pomeroy, after calling attention to the conflict of authority on this subject, observes: "The tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women as against persons *sui juris*, with little or no limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation, there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense." And he adds: "There are, however, decisions which hold, in effect, that since a married woman cannot be directly bound by her contracts or conveyances, even when accompanied with fraud, so she cannot be directly bound through means of an estoppel, and the operation of the estoppel against her must be confined to cases where she is attempting affirmatively to enforce a right inconsistent with her previous conduct upon which the other party has relied. These decisions seem to be in opposition to the general current of authority": 2 Pomeroy's Eq. Jur., sec. 814, and cases cited in note.

There are many cases, both English and American, which support this view of the law: *Boyd v. Turpin*, 94 N. C. 137; 55 Am. Rep. 597; *Hodge v. Powell*, 96 N. C. 64; 60 Am. Rep. 401; *Shivers v. Simmons*, 54 Miss. 520; 28 Am. Rep. 372, and note 374-377; *Bradley v. Snyder*, 58 Am. Dec. 564, and note 569; *Lowell v. Daniels*, 61 Am. Dec. 448, and note 543; *Nash v. Spofford*, 43 Am. Dec. 425, and note 426; *Besson v. Eveland*, 26 N. J. Eq. 471; *Connolly v. Brantsler*, 3 Bush, 702; 96 Am. Dec. 278; 1 Story's Eq. Jur., sec. 385; Kelly on Contracts of Married Women, c. 6, sec. 5; 2 Pomeroy's Eq. Jur., sec. 814, and cases cited.

A vendor's lien for unpaid purchase-money is not such an interest in land as to require an instrument in writing, in

order to waive or alienate it. It is a mere incident of the contract of sale, implied by law, and it may be waived or abandoned by any suitable act or oral declaration showing an intention to do so on the part of one competent to contract: *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Ramage v. Towles*, 85 Ala. 588.

A married woman, as we have said, was, at the time of this transaction, invested with the power under the laws of Alabama to sell and convey her separate estate by the joint deed of herself and husband duly attested or acknowledged: Code of 1876, secs. 2707, 2708. It is justly argued that this power to sell embraces the power to sell for cash or on credit, or partly for both cash and credit. It includes the authority to retain the legal title as security for the payment of the purchase-money, or to convey the legal title, and take in return a mortgage from the vendee to secure it, or to take personal security on the notes for the purchase-money. In other words, she may sell and fix the terms of sale, according to any of the modes sanctioned by common usage. It is our judgment that she may, as an incident of this right to sell, waive her right to enforce her vendor's lien, if not by mere oral agreement, at least by conduct which would preclude her from subsequently asserting such lien upon the principle of equitable estoppel. If she could be estopped in no instance, the morality of the law would be placed upon a very low plane, and the disability of coverture, instead of being, as it ought to be, a shield for her protection against legal wrong, would become a sword of injustice for the license of fraud. While, therefore, a married woman may not always be estopped to deny her capacity to contract, especially so as to convey her property in a mode prohibited by law, she may be estopped by any positive act of fraud as a person *sui juris* would be. Whether in any case not involving a transfer of title to property in a mode prohibited by law she may be estopped by acts *in pais*, unaccompanied by fraud or other tort, we do not now decide.

The application of these principles to the facts of this case does not seem to us to be attended with any great difficulty. The complainant, Mrs. Savannah Wilder, a resident of Texas, and a married woman, agreed to sell to the defendant Sydney T. Wilder, her brother-in-law, certain lands in Lowndes County, Alabama. The correspondence was conducted, on the one hand, through the complainant's husband, at Bartlett, Texas; but she asserts, in her testimony, that she in fact

supervised this correspondence, and controlled the terms of the trade. It was conducted, on the other, through the defendant Sydney Wilder, and H. C. Semple, Esq., a practicing attorney at Montgomery, Alabama, who acted for the complainant. It was first agreed that the vendee should pay as much as four thousand dollars cash, and five hundred dollars on credit, for the land. The deed was drawn by Semple, sent to Texas, and being executed in due form, sent back to him for delivery, on compliance with the terms of sale. The consideration was recited in the deed, but was not stated to have been paid.

The vendee, Sydney Wilder, was to obtain the money which he expected to pay from the American Freehold Land Mortgage Company of London, which had an agent in Alabama, so as to comply with the law as to foreign corporations doing business in this state, but did all business in fact through an agency in New York. To secure the loan from this company, he was to give a first mortgage on the land. The company declined to advance him more than three thousand five hundred dollars. Of this sum he needed all but two thousand dollars to carry on his farming business, and pay other expenses. He thereupon proposed, through Mr. Semple, to modify the contract so as to pay Mrs. Wilder only two thousand dollars cash, and to secure the balance by a second mortgage. This was communicated to the complainant, by letter to her husband, and they authorized the delivery of the deed on these terms, telegraphing Mr. Semple to that effect. The deed was delivered accordingly, a second mortgage being taken to secure the deferred payments, which contained the recital that it was to be subordinate to the mortgage given to the London company. This mortgage was received by Semple as the agent of the complainant. The cash payment was transmitted to her, and she received it with a knowledge of the facts. We need only say that the testimony in the case satisfies us that when the complainant received this money, she either knew or was charged with notice of the fact that her vendor's lien was abandoned by the taking of this second mortgage subordinate to that of the American Freehold Land Mortgage Company of London, which advanced the money on the faith of the assurance that its mortgage was to be superior to hers. The deed executed by the complainant and her husband to Sydney Wilder, and the mortgage executed by the latter to his vendors — reciting that it is subordinate

to the first mortgage of the London company — being contemporaneously executed, would in equity constitute but one transaction. "The two are read together as if they were but parts of a common instrument": *Marks v. Cowles*, 53 Ala. 502, 503.

As matter of contract, therefore, the vendor's lien would seem to be waived. But apart from this, these papers contain within themselves a positive representation that the lien is waived, by the declaration that a second or subordinate mortgage was taken to secure the unpaid purchase-money. The complainant, as we have said, had notice of this fact, and authorized the transaction, in order to induce the London corporation to advance the money which was to come to her through her vendee, Sydney Wilder. The company did act on it, and was drawn in to lend their money on the faith of its truth. To allow the complainant now to repudiate the transaction, by gainsaying the truth of the fact that such lien had been waived, as the papers in question import, would be a fraud on this corporation, which equity and good conscience ought not to permit. In our opinion, a court of equity ought to prevent the complainant from affirmatively asserting the alleged priority of this lien, as she now attempts to do, in contravention of her conduct, upon which the defendant company has relied and been induced to act: 2 Pomeroy's Eq. Jur., secs. 814, 815; *Bradstreet v. Clarke*, 12 Wend. 602.

The decree of the chancellor subordinates her lien for the purchase-money to the first mortgage of the defendant corporation. There is no error in this decree of which she can take advantage on this appeal, and the decree is accordingly affirmed.

MARRIED WOMEN — ESTOPPEL. — The doctrine of estoppel is applicable against married women: *Dobbin v. Cordiner*, 41 Minn. 166; 16 Am. St. Rep. 683, and note; *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40, and particularly cases cited in note.

MOBILE SAVINGS BANK v. McDONNELL.

[89 ALABAMA, 434.]

FRAUDULENT CONVEYANCES — CONSIDERATION. — BURDEN OF PROOF IS ON GRANTEE in a deed executed to him by an insolvent debtor, in payment of an existing debt, to show that the consideration paid for the conveyance was both valuable and adequate, when another creditor, who has reduced his debt to judgment, attacks the conveyance for fraud.

FRAUDULENT CONVEYANCES — WHAT IS VALUABLE CONSIDERATION. — A deed by an insolvent debtor will be sustained, so far as the character of the consideration is concerned, against the attack of creditors, when it appears that the grantee has legally obligated himself to pay a debt due by the grantor to a third person, whether the latter has assented to the substitution or not.

FRAUDULENT CONVEYANCES — VALUABLE CONSIDERATION. — The *bona fide* assumption of liability by the surety for the debt of his insolvent grantor is a valuable consideration for a deed.

FRAUDULENT CONVEYANCES — PROOF OF VALUABLE CONSIDERATION. — Where a deed executed by an insolvent debtor recites as consideration the payment of a debt due by the grantor to the grantee, the true consideration may be shown, when the conveyance is attacked for fraud by another creditor, to be the assumption as principal by the grantee of a debt due by the grantor to a third person, on which the grantee is surety for the grantor.

FRAUDULENT CONVEYANCES — ADEQUACY OF PRICE QUESTION FOR JURY. — Where a deed from an insolvent debtor to his creditor is attacked for fraud, and a valuable consideration for the conveyance is shown, but the evidence shows that the price paid is only about two thirds the value of the property, the question whether the disparity amounts to gross inadequacy is for the jury to determine.

FRAUDULENT CONVEYANCES — ADMISSIBILITY OF DECLARATIONS OF GRANTOR IN POSSESSION. — Where a conveyance from an insolvent debtor to his creditor is attacked for fraud, the declarations of the grantor while in possession of the land, after the conveyance, explanatory of his possession, and to the effect that he held for another, are admissible in evidence.

EJECTMENT. The opinion states the facts. The twelfth charge requested by the plaintiff, and referred to in the opinion, was as follows: "12. If the jury believe, from the evidence, that plaintiff has made out a *prima facie* case, as stated or suggested in the fifth charge asked [and given], then, to defeat a recovery by plaintiff, it will not be sufficient for the defendants to have shown that, on July 30, 1885, O'Donnell made a deed to James McDonnell, which embraced the property in controversy, if the jury believe, from the evidence, that the sum of \$1,644.50, recited in the deed as the consideration therefor, was a grossly inadequate price to be paid at that time for the property it purported to convey."

T. A. Hamilton and S. P. Gaillard, for the appellant.

G. L. and H. T. Smith, for the respondents.

MCCLELLAN, J. This is an action of ejectment prosecuted by the Mobile Savings Bank against Kate McDonnell et al., who claimed through James McDonnell, deceased. The bank was a creditor of John O'Donnell on July 30, 1885, at which date he conveyed the land in controversy to said James McDonnell, upon a consideration which, according to the leading recital of the deed, was \$1,644.50 in money paid; but this recital was qualified by a subsequent clause of the instrument, which is in the following language: "This conveyance is made in payment of a debt due by said John O'Donnell to said James McDonnell for the sum of \$1,644.50." Subsequent to the execution of this conveyance, the claims of the bank against O'Donnell were prosecuted to judgment, and at a sale under execution issued on the judgment the bank became the purchaser, and received the sheriff's deed to the property. It appeared in evidence that O'Donnell continued in possession of the land, exercising acts of ownership over it, up to the time of the sheriff's sale; but on the other hand, evidence was introduced which tended to explain this fact, and to show that O'Donnell's continued possession was as the agent of McDonnell.

The facts above outlined, as also the deeds of the sheriff to the bank, and of O'Donnell to McDonnell, were adduced in evidence by the plaintiff on the trial below; and on the assumption that the consideration of the deed from O'Donnell to McDonnell was the payment of an antecedent debt, a *prima facie* case was thus made out, entitling the plaintiff to a verdict without further proof, unless the defendants showed that the consideration which passed from McDonnell to O'Donnell was both valuable and adequate: *Hodges v. Coleman*, 76 Ala. 103; *Pollak v. Searcy*, 84 Ala. 259; *Roswald v. Hobbie*, 85 Ala. 73; 7 Am. St. Rep. 23; *Morrison v. Morris*, 85 Ala. 196.

In discharging the *onus* thus cast upon them, the defendants introduced evidence which tended to show that the consideration consisted of the extinguishment of the grantor's liability on two certain notes. One of these notes was made by the grantor, indorsed by the grantee, and payable to one Kapahn. The other appears to have been a note executed by Peter Burke, indorsed by the grantor, and payable to the grantee. The Kapahn note was for \$1,644.50. The agree-

ment between O'Donnell and McDonnell, which the evidence tends to establish with respect to this note, was, that the former should reduce the amount, by payment, to one thousand dollars, and that the latter should assume the payment of that balance. There was no evidence that this balance had ever been paid, or that the payee ever released O'Donnell from liability for it; but on the contrary, it appears that the note for the reduced amount was renewed subsequent to the conveyance of July 30, 1885, by O'Donnell, and the renewed paper indorsed by McDonnell, as had been the original. It will have to be considered, therefore, that the tendency of the evidence, with respect to this liability of O'Donnell, goes no further than to afford a basis for the inference that, as between him and his indorser, McDonnell, the debt was to be solely that of the latter, but that they both remained bound to Kapahn; and that the consideration of the conveyance, so far as it resulted from that transaction, was the obligation of the grantee to pay this debt, which the grantor, primarily, and himself as surety, owed to Kapahn. The rulings of the trial court, on instructions given and refused, raise the inquiry whether this was a valuable consideration for the conveyance. In our opinion it was.

It has been several times ruled by this court that a conveyance made in consideration of the grantee's discharging a debt due from the grantor to a third person should be upheld, when assailed for fraud on the alleged infirmity of a lack of a valuable consideration: *Eskridge v. Abrahams*, 61 Ala. 134; *Rankin v. Vandiver*, 78 Ala. 562. It is equally well settled that the fact that the purchase-money of property sold by an insolvent debtor has not been paid, but on the contrary, time is agreed on in which it should be paid, and notes executed for its payment at such time, do not subject the transaction to an imputation of fraud, or invalidate it as against creditors of the vendor: *Shealy v. Edwards*, 75 Ala. 411; 78 Ala. 176; *Caldwell v. King*, 76 Ala. 149. It would seem to logically result, from these two established propositions, that a sale of property by a debtor in failing circumstances will be sustained, so far as the character of the consideration is concerned, against the attacks of creditors, when it appears that the grantee has legally obligated himself to pay a debt due by the grantor to a third person; and, on principle, it would further appear to be immaterial whether such third person had assented to the substitution or not, since, in any event,

the grantor would have the purchaser's obligation to pay the sum agreed on.

But the conclusion need not be rested on deduction from other adjudged propositions. The question itself has been the subject of judicial inquiry and determination. Thus in Indiana, under statutory provisions similar to those in Alabama, it has been held that "where a surety assumes the debt of his principal, and mortgages his real estate to secure it, and in consideration of these acts, personal property is conveyed to him by the principal, the transaction rests upon a valuable consideration, and the conveyance cannot be set aside, unless it be made to appear that both buyer and seller were guilty of fraud": *Powell v. Stickney*, 88 Ind. 810.

In discussing a like question, Rice, C. J., in *Reynolds v. Cook*, 81 Ala. 637, says: "We do not doubt that a valid conveyance of personal property, to provide indemnity for the sureties on a guardian's bond, may be made." But under our statutes "it is essential to the validity of such a conveyance that at least its whole purpose should be the devotion of the property, *bona fide*, to the indemnification of the sureties. If a part of its purpose is that it shall avail or be used for the ease or favor of the grantor, it is void as to creditors." And in that case, the conveyance was held void, because of the reservation of a benefit; while the doctrine that the assumption of liability by the surety for the debt of the grantor constituted a valuable consideration was fully recognized. That, it would seem, is the principle involved here, and it is further and more directly supported by later adjudications of this court: *Coleman v. Hatcher*, 77 Ala. 217.

This agreement, with respect to the Kapahn note, in our opinion, therefore, was a valuable consideration for the conveyance. Whether it was such a consideration as could be relied on, in view of the recitals in the deed of a different consideration, is a question which the assignments of error require us to determine. The rule appears to be well settled that a consideration differing in kind from that recited in the deed — as where the recital is of a good consideration, and it is proposed to show a valuable consideration — cannot be proved: *Houston v. Blackman*, 66 Ala. 559; 41 Am. Rep. 756; *Potter v. Gracie*, 58 Ala. 307; 29 Am. Rep. 748. But it is equally well settled that, under a deed reciting a money consideration, or a consideration resting in the payment of a debt, or any other valuable equivalent, it is competent to support the conveyance

by parol proof of any consideration, however differing from the recital, which is valuable as distinguished from a merely good consideration, since thereby the effect and operation of the instrument is not changed, and the rule against varying or altering writings by parol testimony is not offended: Wait on *Fraudulent Conveyances*, sec. 221; *Hubbard v. Allen*, 59 Ala. 297; *Stringfellow v. Ivie*, 73 Ala. 209; *Mobile etc. R'y Co. v. Wilkinson*, 72 Ala. 286; *Manning v. Pippen*, 86 Ala. 357; *McKinster v. Babcock*, 26 N. Y. 378.

So much for the Kapahn indebtedness. As to the other debt, which is relied on as constituting in part the consideration of the deed, it must be confessed that the evidence is exceedingly meager. Yet we are unable to concur with appellant's counsel that there was no testimony from which the jury could have inferred that such a liability existed, and that it was discharged by the conveyance to McDonnell. O'Donnell swears: "I owed the Kapahn note, and was to reduce the Kapahn note to under a thousand dollars, and the balance was paid for a note which he (McDonnell) held of Peter Burke." This note is referred to in the examination as the note of Burke to McDonnell; and the latter further testified that he paid "on the indorsed note the balance of six hundred dollars." The jury had a right to consider this testimony, and to reconcile it with what appears, further on in the examination, to have been contradictory of it; or failing in that, to elect which part of this evidence they would believe. The sum thus paid, together with the balance of the Kapahn note assumed by McDonnell, amounted to about the recited consideration; and there was some evidence that this gross sum was a fair equivalent for the property.

Without reviewing the action of the court below in giving the charge requested by the defendants, and refusing charges numbered 2, 3, 4, 14, 15, and 16, requested by the plaintiff, in detail, it will suffice to say that its ruling in each particular is justified under the view we have taken of the tendencies of the testimony and the law applicable thereto. The exception in each instance proceeds on some theory of fact which the record does not support, or of law which we have endeavored to demonstrate is unsound; as, for example, that there was no proof of a valuable consideration, or that the agreement of the grantee to pay the debt of the grantor was not such a consideration, or that there was no evidence of the grantor's liability to the grantee as indorser for Burke,

or that it was necessary for defendants to show that the property had been paid for in money according to the first recital of the deed, or that a debt due from the grantor to the grantee had been paid, according to the qualifying recital of the deed, or, generally, that the defense failed, if there were a variance between the recited consideration and that which the evidence tended to establish; and this though each was a valuable consideration.

Charges 13 and 14, requested by the plaintiff, were properly refused. They undertook to call the attention and invite the consideration of the jury to sundry facts and circumstances developed in evidence, tending to cast suspicion on the transaction, and which were supposed to be persuasive of fraud. Charges of this character have been, time and again, condemned by this court, as mere arguments proper to be made by counsel, but not proper to be given to the jury by the court, whose office is to instruct the triers of facts as to the law applicable to the facts, but not as to deductions and inferences to be drawn from them: *Hussey v. State*, 86 Ala. 34; *Snider v. Burks*, 84 Ala. 53; *Birmingham Brick Works v. Allen*, 86 Ala. 185.

This disposes of all assignments of error predicated on charges given and refused, except that which relates to charge No. 12, requested by the plaintiff. That ought, in our opinion, to have been given. The case made by the recitals of the deed, and the case relied on by the defendants, and which alone their testimony tended to establish, was that of a conveyance made in consideration of the payment of an antecedent debt. The plaintiff, as we have seen, made out a *prima facie* case, and was entitled to a verdict on that showing, unless the defendants should prove certain facts. The *onus* thus cast on the defendants involved, as we have also seen, and as is settled by the authorities cited, proof, to the satisfaction of the jury, of two things, with respect to the consideration: 1. That it was valuable; and 2. That it was adequate. If they failed in either particular, they failed to rebut the *prima facie* case made by the plaintiff, and to defeat its right to a verdict. This conclusion is a necessary resultant, not only from the language of this court in formulating the rule as to the burden of proof, but also from its well-established and many times repeated doctrine, that while a creditor of a failing debtor may save himself by taking property in payment of his debt, and this regardless of the actual intent as to other

creditors which may characterize the transaction, he will, in no case, be allowed to take more than is reasonably sufficient to his indemnification, and if he transcends this limitation, and takes property of the debtor worth more than the amount of his claim, he puts himself, as to the entire transaction, beyond the pale of the law's protection from the just demands of other creditors: *Pritchett v. Pollock*, 82 Ala. 169; *Levy v. Williams*, 79 Ala. 171; *Knowles v. Street*, 87 Ala. 357; *Hodges v. Coleman*, 76 Ala. 103; *Leinkauf v. Frenkle*, 80 Ala. 136; *Greenhut v. Greenhut*, at present term.

The effect of the rule fixing the burden of proof as to adequacy of consideration upon the defendant in this class of cases, and prescribing the boundaries beyond which the creditor of an insolvent debtor cannot go in taking property in payment of his debt, is to raise up, for all practical purposes, a presumption of the *mala fides* of the sale which purports to be in discharge of the debt; and to meet this presumption, and impress the transaction with the attributes of fair dealing and good faith as against attacking creditors, a valuable, and at least measurably adequate, consideration must be shown: *Moog v. Farley*, 79 Ala. 252; *Calhoun v. Hannan*, 87 Ala. 277. If this is shown, all inquiry, as had been many times ruled by this court, into the actual intent of the parties is foreclosed. If it is not shown, bad intent is presumed, and the question as to what purpose really actuated the parties becomes immaterial. So that it seems to be a necessary resultant, from our decisions, that the inquiry into the good or bad faith of the parties, as a matter of fact, and disassociated from presumptions of law, is, for all practical purposes, wholly eliminated in cases like this. Badges of fraud may doubtless be looked to, when they tend to impeach the consideration, but not as establishing a covinous intent, having no connection with the character or sufficiency of the price paid.

The conclusion to which the authorities referred to thus lead us is, we think, supported by the logic of the situation, so to speak. If the debt thus sought to be paid is, in point of fact, unjust, I apprehend that the utmost good faith, the most implicit belief in its correctness, on the part of both buyer and seller, would not validate the transaction. On the other hand, if the debt is just, but in amount only one half or one third the value of the property, should the purchasing creditor be allowed to thus pay himself twice or thrice over, merely because it is shown, ever so clearly, that he acted in good faith, and owing,

it may be, to some particular opinion of his as to the value of property, or of the particular property, or ignorance of its value, honestly believed he was paying an adequate price for it? In all reason it would seem that other creditors are entitled to some protection against the ignorance or intellectual idiosyncrasies of such a purchaser, and that this protection should be found in the judgment of the jury as to whether the buyer has received greatly more than he has paid for, by the satisfaction of his debt, or, what is the same thing, has satisfied a debt grossly less in amount than the value of the thing he has received. And while "the law will not weigh considerations in diamond scales," nor so closely balance the property against the price as to leave no room for the ordinary differences of opinion as to values, yet when the jury can see that the disparity amounts to a gross inadequacy, their verdict should be against the transaction. The charge under consideration, when referred, as it must be, to the evidence, properly submitted this inquiry to the jury. It was not abstract. The disparity between the whole price and the whole property, which a part of the evidence tended to show, was as sixteen hundred is to twenty-five hundred dollars; or if the price paid for the whole property, including that in controversy with other parcels, be apportioned to the property sued for, the difference, according to plaintiff's testimony, is as thirteen hundred is to two thousand dollars. We are not prepared to affirm that this disparity is not gross, as hypothesized in the charge.

We are fully aware that the view we have taken is something of a departure from the generally received doctrine in other courts, as well as former *dicta* of this court, which are to the effect, in general terms, that mere inadequacy of price, short of a disparity so gross as to shock the conscience of mankind, is only a badge of fraud, and, of itself, is not to be taken as establishing the existence of evil intent; but in our jurisprudence, that doctrine, if any weight is to be given to our repeated enunciations on the subject, or to the reasons upon which our decisions are based, is and must be confined to sales other than in the payment of antecedent debts by insolvent debtors drawn in question by other creditors. It would be a contradiction, in terms, to say that the requirement of our adjudged cases, that the defendant claiming under such sale must, as against a *bona fide* creditor, prove an adequate consideration, is met and fulfilled by proof of a

grossly inadequate consideration, and it were palpable stultification to so hold.

We do not think the court below erred in admitting the declarations of O'Donnell, while in possession of the land sued for after the conveyance, explanatory of his possession, and to the effect that he held for another: *Perry v. Graham*, 18 Ala. 822; *Johnson v. Boyles*, 26 Ala. 576; *Humes v. O'Bryan*, 74 Ala. 79.

For the error pointed out above, the judgment of the circuit court must be reversed, and the cause remanded.

FRAUDULENT CONVEYANCES — BURDEN OF PROOF. — As to the burden of proof in fraudulent conveyances, generally, see note to *Brown v. Mitchell*, 11 Am. St. Rep. 758, 759. A sale of goods by an insolvent debtor giving preference to one creditor casts upon such creditor the burden of proving fair dealing and an adequate consideration: *Roswald v. Hobbie*, 85 Ala. 73; 7 Am. St. Rep. 23, and note. A vendee who sues as owner of goods attached by the vendor's creditors, who attack the sale as fraudulent, has the *onus probandi* that he has a valid title: *Buckingham v. Tyler*, 74 Mich. 102.

DEED — CONSIDERATION — SURETYSHIP. — Grantee's liability as a surety of the grantor is a good consideration to support a conveyance against the grantor's creditors: *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562.

EVIDENCE — DECLARATIONS AS TO POSSESSION OF REALTY. — Declarations of a person while in possession of land, whether as tenant or proprietor, as to the manner in which the land is occupied, are admissible against himself or those claiming under him: *Beecher v. Parmele*, 9 Vt. 352; 31 Am. Dec. 633.

McCALL v. MASH.

[89 ALABAMA, 487.]

MORTGAGES — SALE OR ASSIGNMENT OF RIGHT TO DISAFFIRM SALE AFTER PURCHASE BY MORTGAGEE UNDER POWER. — Where a mortgagee has purchased at a sale under a power contained in the mortgage, without the consent of the mortgagor, the latter has a right, within a reasonable time, to disaffirm the sale, and ask for redemption and an account of the rents and profits; but if he takes no steps to disaffirm the sale, he cannot assign, sell, nor convey the land so as to vest in his assignee the right to disaffirm the sale, and redeem in his own name.

MORTGAGE — PURCHASE AT SALE UNDER POWER. — Where the mortgagee purchases at his own sale under the power contained in the mortgage, the sale is binding on him, and his only right or remedy is to apply in equity, if the mortgagor does not come in within a reasonable time to avoid the sale, to clear his title of doubt and uncertainty, by a confirmation of the sale, or a resale under order of court, as may appear equitable.

MORTGAGE — PURCHASE AT SALE UNDER POWER. — A mortgagee purchasing at his own sale under the power in the mortgage acquires the benefit. — AM. ST. REP., VOL. XVIII — 10

fidal interest of the mortgagor, subject to be defeated by his election to avoid the sale within a reasonable time, but as to the latter, the sale is not void, but voidable only, and is valid for all purposes, until he, or some one claiming under him, whose rights are injuriously affected, does some act legally sufficient to render it void. So long as there is no disaffirmance of the sale, the equity of redemption is cut off; and if there is no disaffirmance within a reasonable time, no further act is required to give validity to the sale, which acts as a foreclosure.

Richardson and Steiner, for the appellant.

Edward Crenshaw, Gamble and Powell, and Stallings and Wilkinson, for the respondents.

CLOPTON, J. While the equity of redemption constitutes the beneficial estate of the mortgagor in the land subject to the encumbrance, and, being regarded a valuable right and property, may be conveyed in the same manner as the land itself, clothing the grantee with the right to discharge the encumbrance, so that the estate may be rendered valuable and beneficial, yet, in order to be the proper subject of conveyance, it must be a subsisting estate and interest, and the right of redemption must be exercised while the mortgage is redeemable, before a foreclosure by decree of the court, or by sale under power contained therein. A seeming, but not real, exception to this general rule is, where the mortgagee purchases at his own sale, without the consent of the mortgagor. In such case, the mortgagor, or persons claiming under him in privity, may disaffirm the sale and redeem, the election to do so being seasonably expressed: *Thomas v. Jones*, 84 Ala. 302; *Downs v. Hopkins*, 65 Ala. 508.

Under a power of sale contained in a mortgage executed by S. P. McCall, in May, 1886, to Nathan Mash, the mortgagee sold the lands conveyed thereby, and became the purchaser at the sale. After the sale, and without taking any steps to disaffirm it, the mortgagor sold and conveyed the lands to appellant, who thereupon filed the bill to vacate the sale, and to be let in to redeem, and for an account of the rents and profits. In the absence of fraud, a foreclosure by a sale under a power conferred by the mortgage as effectually cuts off the equity of redemption as a decree of strict foreclosure in a court of equity would do: *Childress v. Monette*, 54 Ala. 317.

If a mortgagee purchases at his own sale, it is binding on him, and his only right or remedy is to apply in equity, if the mortgagor does not come in to avoid it, to clear his title of doubt and uncertainty, by a confirmation of the sale, or a

resale under a decree of the court, as may appear equitable. The mortgagee acquires the beneficial interest of the mortgagor, subject to be defeated by his election to avoid the sale, expressed in a proper proceeding, and in due time. As to the mortgagor, the sale is not absolutely void, but merely voidable; and it is valid for all the purposes intended, until the mortgagor, or some one claiming under him, whose existing rights are injuriously affected thereby, does some act legally sufficient to render it void. So long as there is no disaffirmance, the equity of redemption is as effectually cut off as if a stranger were the purchaser. If no proceedings are taken by the mortgagor, or any one claiming under him, to become reinvested with his equity of redemption, and to restore it to its original *status*, within a reasonable time, no further act is required to give validity to the sale; it has full force and effect from the time when made, and establishes all the rights incident to a valid foreclosure. The equity of redemption being cut off, some proceeding to which the mortgagee is a party is essential to restore it to the state and condition in which it was prior to the sale. Until the disaffirmance, the mortgagor has no subsisting estate which he can convey. There remains in him only a naked right or privilege to disaffirm, and become reinvested with his beneficial interest for the purpose of redemption.

At law, the sale, if it has been regular, and without fraud, is valid, the mortgagee being regarded as clothed with the legal estate. The sale can be disaffirmed only in a court of equity. That which remains in the mortgagor, therefore, lies in action, a mere right to sue. A right which exists only in action is incapable of assignment and conveyance so as to authorize the assignee to sue in his own name. The complainant took no estate in the lands by the conveyance of the mortgagor, and did not acquire a right to disaffirm the sale in order to redeem: *Bernstein v. Humes*, 60 Ala. 582; 31 Am. Rep. 52; *Crocker v. Bellangee*, 6 Wis. 645.

Affirmed.

MORTGAGE — PURCHASE BY MORTGAGEE — RIGHT OF REDEMPTION. — A purchase by a mortgagee at his own sale, under a power in the mortgage not authorizing him to purchase, gives the mortgagor an option of affirming or disaffirming the sale within a reasonable time, and if he disaffirms, to redeem: *Alexander v. Hill*, 88 Ala. 487; 16 Am. St. Rep. 55, and note.

ASSIGNMENT. — As to the assignability of mere equitable rights, see note to *Marshall v. Means*, 56 Am. Dec. 449-451.

WESTERN UNION TELEGRAPH CO. v. HENDERSON.

[89 ALABAMA, 519.]

TELEGRAPH COMPANIES — SUIT AS PRESENTMENT OF CLAIM. — Commencement of suit against and service of process upon a telegraph company within sixty days after sending a message is equivalent to presentment of the claim, and dispenses with compliance with a condition on the company's blank that it will not be liable in any case where the claim is not presented in writing within sixty days after sending the message.

TELEGRAPH COMPANIES — FREE-DELIVERY LIMITS — DUTY OF SENDER OF DISPATCH TO KNOW. — Where a telegraph company has established free-delivery limits, notice of which is given on its blanks, the duty is on the sender of the dispatch of ascertaining whether the person to whom the message is sent resides within the free limits, and to make provision for delivery if such person resides beyond them, and to notify the sending operator of the fact. A failure to observe this duty will excuse prompt delivery by the company.

TELEGRAPH COMPANIES — FREE-DELIVERY LIMITS — DUTY OF COMPANY. — Where a telegraph company has established free-delivery limits, notice of which is given on its blanks, and a message is handed in for transmission without explanation, the presumption is, that the sendee lives within the free-delivery limits, and the sender takes the risk of delivery, unless he arranges for delivery at a greater distance. In such case, the transmitting operator is under no duty other than to forward the message accurately, with proper diligence; and the terminal operator is under no other duty than to copy the message correctly, and deliver it with all convenient speed, if the sendee resides within the free-delivery limits.

TELEGRAPH COMPANIES — FREE-DELIVERY LIMITS — BURDEN OF PROOF. — Where a telegraph company has established reasonable free-delivery limits, notice of which is given on its blanks, a conditional obligation is created, contingent on the sendee's residence being within such limits; and the burden of proof is on the sender of the message to show that the sendee resided within such limits, before the company can be held liable for want of prompt delivery.

TELEGRAPH COMPANIES — MENTAL ANGUISH AS ELEMENT OF DAMAGES FOR DELAY IN DELIVERY OF DISPATCH. — Where the face of a dispatch plainly suggests the necessity for prompt delivery, if within the free-delivery limits established by the company, the sender's mental anguish is an element for which damages may be recovered for delay in delivery.

TELEGRAPH COMPANIES — NON-REPEATED MESSAGE. — Where a non-repeated message was correctly and without delay transmitted to the terminal office, and there received, understood, and copied correctly, and an action is brought for delay in its delivery, the stipulation in regard to non-repeated messages contained in the printed blanks of the company is inadmissible in evidence, and has nothing to do with the case.

TELEGRAPH COMPANIES — EVIDENCE OF BUSINESS CONDITIONS TO EXCUSE LIABILITY. — Where a telegraph company has contracted to transmit and deliver a message, it cannot excuse its liability for non-delivery on the ground that the business and emoluments of the terminal office were insufficient to justify the employment of an operator, or a messenger-boy to deliver messages.

TELEGRAPH COMPANIES — EVIDENCE OF PHYSICIAN'S CUSTOM IN ANSWERING CALLS.— Where a telegraph company has contracted to transmit and deliver a message summoning a physician, it cannot excuse its liability for delay in delivery by proof that it was not the custom of the physician to make professional calls at a distance, without prepayment, or guaranteed payment, of his charges.

EVIDENCE OF PLEASURE, PAIN, OR SUFFERING.— Natural utterances and expressions indicative of pleasure or displeasure, pain or suffering, are original evidence, and competent to be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry.

TELEGRAPH COMPANIES — DECLARATION OF OPERATOR AS EVIDENCE.— In an action against a telegraph company for damages arising from delay in delivering a message, the reply of the operator at the terminal office, in response to the inquiry of the sender why the message had not been delivered, is not admissible in evidence against the company.

Gaylord B. Clark and Frank B. Clark, for the appellant.

G. L. and H. T. Smith, for the respondent.

STONE, C. J. St. Elmo and Grand Bay are two stations on the line of roads operated by the Louisville and Nashville Railroad Company. They are five miles apart, and are small villages. Louis Henderson resided near St. Elmo station, and Dr. Rohmer, his family physician, resided near Grand Bay station. At noon, June 26, 1887, Henderson procured to be dispatched at St. Elmo, to Dr. Rohmer at Grand Bay, a telegraphic message in the following language: "Come first train to see my wife; very low." This message was marked "Prepaid, twenty-five cents." In addition, both the sender and the telegraphic operator testified that that sum was prepaid. The operator testified that Henderson inquired what the charge was, and on being informed it was twenty-five cents, paid it to him. The message, though not repeated, reached the operator at Grand Bay without mistake and without delay.

Dr. Rohmer testified that he received this telegram about nine o'clock, A. M., June 27th, the day after its transmission; that it was handed to him at his residence, but he did not state by whom. He testified further, that if he had received the message on the 26th, he would have obeyed it, traveling either by train or by private conveyance. He reached the patient about noon on the 27th, and relieved the intensity of her suffering; but she died about six hours afterwards. He did not know whether, if he had reached her the day before, her life could have been saved. Plaintiff testified that when the telegram was sent, his wife was suffering acutely, and

that her suffering increased until the arrival of the doctor, when he alleviated it.

The present action was brought to recover damages for the non-delivery of said telegram within a reasonable time. The defendant interposed five pleas in bar, but at present we propose to consider only those on which issues of fact were formed. These are pleas 3 and 4. A demurrer was interposed by plaintiff to each of these pleas, 3 and 4, and the demurrers were overruled. There was no error in this.

In the printed caption of all messages sent by the telegraph company are certain conditions on which the company receives and transmits messages, and no message is received or sent unless it is written on the company's blank, preceded by the conditions. The message in this case was written on the company's blank, and was preceded by the printed conditions. One of the conditions is, that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message." Plea No. 3 set up this condition, and averred that the claim here sued on was not presented to the company within sixty days after sending the message. To this plea plaintiff filed a replication, averring that in less than sixty days after the message was sent the present suit was brought, a complaint filed setting forth the claim of damages for non-delivery of the message, and service of a copy of the complaint on the defendant corporation,—all within sixty days. To this replication the defendant demurred, and the court overruled its demurrer.

There are decisions which hold that a suit setting forth the ground of complaint instituted and process upon it served within the sixty days is not a compliance with this regulation: *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83; 1 Am. Rep. 387; *Western Union Tel. Co. v. McKinney*, 8 Am. & Eng. Corp. Cas. 123. Such regulation is generally held to be valid and binding: *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Young v. Western Union Tel. Co.*, 65 N. Y. 163; *Western Union Tel. Co. v. Rains*, 63 Tex. 27; *Fire Ins. Co. v. Felrath*, 77 Ala. 194; 54 Am. Rep. 58. Our own rulings on a question not distinguishable from this in principle have been different: *East Tennessee etc. R. R. Co. v. Bayliss*, 74 Ala. 150; *South etc. R. R. Co. v. Morris*, 65 Ala. 193; *South etc. R. R. Co. v. Bees*, 82 Ala. 340. The circuit court did not err in overruling the demurrer to the replication to the

defendant's third plea. The averments of that replication being unquestionably true, as shown by the record, that line of defense will receive no further consideration.

On the trial of this cause, the real controversy, both in fact and law, so far as the mere right of recovery was concerned, arose on the issue raised by the fourth plea. That plea sets up, as a defense to the whole action, that the defendant corporation had established a limit within which it undertook to make free delivery of messages sent over its wires, which limit was a half-mile, or radius of a half-mile, from its office, at places having the population that Grand Bay had; that in the said printed heading, which accompanied and formed part and condition of every written message it received for transmission, including the one received in this case, was and is the following clause: "Messages will be delivered free within the established free-delivery limits of the terminal office; for delivery at a greater distance, a special charge will be made, to cover the cost of such delivery"; and that Dr. Rohmer, to whom said message was sent, did not live within the said free-delivery limits of said office. The plea then avers that no consideration was paid or tendered by plaintiff for the delivery beyond the free-delivery limits, and no notice was given by the sender, nor did the telegraphic operator know, that Dr. Rohmer was not living within said limits. This plea was followed by much pleading, and many rulings of the court. We will not set out the various steps taken, but will declare the rules by which the relative duties of the parties must be determined.

Telegraphy is a quick-moving substitute for mail service, which, by contrast, has become tardy. Celerity is its boast, and when rapid communication is desired, its instrumentality is invoked. It cannot be presumed that the operator at the initial or receiving office will know every one to whom a message is proposed to be sent through his office, or will know that such person will be found within the free-delivery limits of the terminal office. The sendee may live just without the limits, or he may live miles away. Placing the duty on the sender of ascertaining whether the person to whom the message is addressed resides within the free limits is a reasonable rule. It is reasonable because, in most cases, the sender will know where the sendee resides, and can inform the operator. In the event the sender does not know the residence or business office of the sendee, it is but reasonable to

require him to inform himself, or to make provision for delivery beyond the limits, should it be found that the residence is beyond them. This is placing the duty where it is both reasonable and bearable, instead of imposing an intolerable burden on the operator or company. The reasons will suggest themselves without being stated. The rule is reasonable, and law is, or should be, reasonable.

When Henderson applied to have his message sent, if Dr. Rohmer lived more than a half-mile from the terminal office, he should have so informed the operator, if he knew it, or could learn it; and if he was in doubt whether the doctor lived within the limits, he should have informed the operator, and made provision for delivery beyond the limits, if he desired and expected prompt delivery. When a message is handed in for transmission, the presumption must be, and is, that the sendee lives within the limits of free delivery, or that the sender takes the risk of delivery, unless he makes arrangements for delivery at a greater distance. And handing in such message, without explanation, casts no duty on the transmitting operator, other than to forward the message accurately, and with proper diligence. And it casts no duty on the terminal employee or operator, other than to copy the message correctly, and to deliver it with all convenient speed, if the sendee reside within the free-delivery limits.

What we have said is intended for the government of the senders of all telegrams, whether intelligent or non-intelligent. All men are conclusively presumed to know the law, and no discrimination between classes can be maintained, either by the law or by sound reasoning. The principle rests on juridical necessity.

It may as well be stated here as anywhere else, that the plaintiff, when testifying as a witness for himself, stated that he knew the rule of the telegraph company which guaranteed free delivery if the sendee lived within a half-mile of the terminal office, and no farther. And the testimony of the sending operator tended to show that, before sending the message, he inquired of the plaintiff how near the terminal station or office Dr. Rohmer lived, and he answered, "Close by." Henderson gave no testimony in regard to this. No testimony was introduced tending to prove that anything was said, either by Henderson or by the operator, having any reference to delivery beyond a half-mile. And we may here state, as proved and uncontroverted facts, that the charge — twenty-

five cents—was prepaid for sending the message, and that the plaintiff, Henderson, knew of the half-mile limit to free delivery.

The contested question of fact was, whether Dr. Rohmer's residence was within a half-mile of the terminal office. Witnesses testified that there was a travelable and traveled road which cut off an angle, and brought the distance within a half-mile. Other witnesses controverted the existence of any road which cut off the angle and shortened the distance. According to their testimony, Dr. Rohmer's residence was not within a half-mile of the terminal office. This was a question for the jury, and, with a single exception, the circuit court submitted this question fairly to the jury. That question is the burden of proof.

Free delivery within a half-mile is not a restriction of a right, but a qualified privilege granted. It is not an inherent right; for if it were, in the absence of restriction, it would have no limits. To show to what absurd results this would lead, let us suppose the contract to transmit a message is silent about free delivery. If we hold the clause in controversy to be restrictive of a right, then, in the case supposed, the telegraph company would be bound to deliver to the sendee, no matter how great the distance to his residence. Free delivery is a conditional obligation, contingent on the sendee's residence being within the area of free delivery; and until that condition is shown, the telegraph company is not put in default. The *onus* of proving that Dr. Rohmer's residence was within a half-mile was on the plaintiff: 3 Brickell's Digest, 433.

Whether, in such a suit as this, damages can be recovered for mental anxiety, or mental distress, caused by the non-delivery of the message through the negligence of the telegraph company, is a question upon which the authorities are in palpable conflict. They are not alone in conflict; they are widely variant. Some rulings reject such evidence in all cases which are based on breach of contract. Others reject it when there is no element of recovery other than mental suffering, but receive it in aggravation, when there is another independent cause of action. On this last principle, a distinction is taken, in some cases, between suits in which the sender is plaintiff, and those in which the sendee complains. In the one case, the suit is by a party to the contract, who can maintain an action for its breach, even though he may be

able to recover only nominal damages. In the other, there is no privity of contract, and there can be no recovery except for actual damages proved. There is therefore, in this case, if the rule be sound, an independent right of recovery, to which distress of feeling becomes an aggravating incident. There are still other authorities which hold that such evidence is admissible on general principles, and as an independent ground of recovery. We cite many authorities, but will not attempt to reconcile them; nor will we comment on them further: *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 542; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580; 59 Am. Rep. 623; *So Relle v. Western Union Tel. Co.*, 55 Tex. 308; 40 Am. Rep. 805; *Hays v. Houston etc. R'y Co.*, 46 Tex. 272; *Western Union Tel. Co. v. Simpson*, 73 Tex. 422; *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 534, 535, and note; *Logan v. Western Union Tel. Co.*, 84 Ill. 468; *Baltimore etc. Turnp. Co. v. Boone*, 45 Md. 344; *Walsh v. Chicago etc. R'y Co.*, 42 Wis. 23; 24 Am. Rep. 376; *Russell v. Western Union Tel. Co.*, 3 Dak. 315; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

As to the element of mental anguish claimed to have been suffered by the plaintiff, we think it the proximate consequence of the failure to deliver the message, and that the perusal of the message would naturally suggest such consequence as likely to ensue from the non-delivery. The right of the plaintiff to sue for the breach of the contract to deliver, if within the free-delivery distance, takes this case out of the rule, if a sound one, that mental distress will not maintain the suit, when there is no other element of recoverable damage. We find no error in the rulings as to the proper elements of damage; and we agree with the circuit court in holding that there was no proof which authorized exemplary or vindictive damages.

In the light of the principles declared above, some portions of the general charge, which we have not referred to specially, and the charge given at the instance of the plaintiff, are subject to criticism; but we deem it unnecessary to comment further upon them. What we have said will furnish the proper correction. The ninth charge, asked by defendant, ought to have been given.

The message, for the failure to deliver which the present

suit was brought, was not a repeated message. Pleas were interposed, and charges were asked, based on stipulations in regard to non-repeated messages, as set forth in the printed caption attached to the form, or blank, on which the message was written. The message, though not repeated, was correctly and without delay transmitted to the terminal office, and was there understood and copied accurately. This answered all ends repeating could have accomplished, and leaves that clause without practical operation in this case. None of the provisions intended to be restrictive of liability on non-repeated messages, and none of the stipulations for exemption from the consequences of negligence, have any proper consideration in the determination of this case: *Western Union Tel. Co. v. Way*, 83 Ala. 542; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168; 24 Am. Rep. 279; 3 Sutherland on Damages, 296, 297. The demurrers to pleas 2 and 5 were properly sustained, and all charges seeking to raise the questions presented in those pleas were properly refused.

The attempt was made in the trial court to excuse the telegraph company from liability for non-delivery of the message, on the ground that the business and emoluments of the office at Grand Bay were insufficient to justify the employment of a separate telegraphic operator, or a messenger-boy to deliver messages. *Belun v. Western Union Tel. Co.*, 8 Cent. Law J. 445, is relied on in support of this position. This may furnish a very good reason for withholding telegraphic service, or, perhaps, for different regulations in regard to delivery, at places thus circumstanced. It affords no excuse for violating the terms of a contract. We cannot follow Belun's case.

The defendant offered to prove in defense that it was not the custom of Dr. Rohmer to make professional calls at a distance, without prepayment, or guaranteed payment, of his charges. This testimony, on objection, was ruled out. There was no error in this. If the doctor lived within the area of free delivery, it was not for the telegraphic operator to speculate on the chances that the summons would or would not be obeyed. If it had been shown that Dr. Rohmer would not have obeyed if he had received it, this, it would seem, would have proved that the plaintiff suffered no real injury from the failure to deliver the message. So far from this being proved, Dr. Rohmer testified that if he had received the message he would have obeyed the call.

The natural utterances and expressions indicative of pleasure, displeasure, pain, or suffering are competent, original evidence, that may be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry: Wood's Practice Evidence, sec. 147.

Two parts of the testimony received at the instance of plaintiff should have been rejected: 1. The answer of the operator at Grand Bay, made on the 27th, in reply to plaintiff's inquiry why the message had not been delivered; and 2. That the Western Union Telegraph Company was a wealthy corporation.

We have now noticed every material question raised by the record.

Reversed and remanded.

TELEGRAPH COMPANIES — CONDITION AS TO THE MANNER AND TIME OF PRESENTING A CLAIM AGAINST COMPANY. — The authorities all agree that the stipulation with a company that it will not be liable for damages in any case where the claim is not presented in writing within a certain number of days after the sending of the message is valid and binding: Note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 471.

TELEGRAPH COMPANIES — DAMAGES FOR NOT DELIVERING MESSAGE PROMPTLY — MENTAL ANGUISH. — As to when mental suffering and anguish is an element in the damages recoverable against a telegraph company for failing to deliver a message promptly, see *Western Union Tel. Co. v. Moore*, 76 Tex. 66; *ante*, p. 25.

TELEGRAPH COMPANIES — POWER OF THE COMPANY TO IMPOSE CONDITIONS upon senders of telegraphic messages, generally, see note to *Camp v. Western Union Tel. Co.*, 71 Am. Dec. 463 et seq., wherein are discussed conditions limiting the company's liability for non-repeated messages.

EVIDENCE. — Exclamations of pain by the person suffering are admissible to show the physical or mental condition of the sufferer: Note to *People v. Vernon*, 95 Am. Dec. 66-68.

STEPHENS v. REGENSTEIN & Co.

[89 ALABAMA, 561.]

FRAUDULENT CONVEYANCES — SALE OF GOODS WITH AGREEMENT FOR EMPLOYMENT AS CLERK. — Where, on the sale of goods by an insolvent debtor, he agrees with the purchaser that the business shall be continued and himself employed as clerk at a monthly salary, the debtor thus secures to himself a benefit which renders the transaction fraudulent as to so much of the property sold as is in excess of his statutory exemptions.

TRIAL of right of property in and to a stock of goods held under attachment by Regenstein & Co. against T. A. Stephens, and B. F. Stephens as claimant. The opinion states the facts.

Gardner and Wiley, for the appellant.

STONE, C. J. The bill of exceptions in this record affirms that it contains all the evidence. On the question which we consider decisive of the case, the testimony comes from the claimant,—appellant here,—and it is free from conflict. One of the terms of the sale from T. A. Stephens, the debtor, to B. F. Stephens, the claimant, was, that the business should be continued in the name of said B. F., the purchaser, and that T. A. Stephens, the failing debtor, should be placed in control and management of it at a monthly salary of forty dollars. B. F. Stephens, the purchaser, knew his brother, T. A. Stephens, was insolvent, and that the purpose of the sale was to enable him to prefer certain creditors, of whom his mother was one. The sale was for money. One of the direct results of the sale was, that by the agreement the failing debtor secured to himself a paying employment, which, but for the sale and agreement, he would not have had. This was a benefit secured to him, which rendered the transaction fraudulent as to that part of the property conveyed which was in excess of the debtor's exemptions: *McDowell v. Steele*, 87 Ala. 493, and authorities cited; *Knowles v. Street*, 87 Ala. 357.

The recovery in this case was only for the excess above T. A. Stephens's exemptions, and to that extent the plaintiff was clearly entitled to a verdict. The general charge in favor of plaintiffs, if asked, should have been given, which would have secured to them the precise recovery they obtained. Under such circumstances, we will not inquire whether or not error was committed in charges given or refused. Such errors, if any were committed, were without injury: *Pritchett v. Pollock*, 82 Ala. 169; *Smith v. Georgia etc. R'y Co.*, 88 Ala. 538; 16 Am. St. Rep. 63.

Affirmed.

FRAUDULENT CONVEYANCES.—As to what change of possession of goods is sufficient as against the creditors of the vendor, see note to *Clafin v. Rosenberg*, 97 Am. Dec. 340 et seq.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

[IN BANK.]

SPANGLER v. SAN FRANCISCO.

[84 CALIFORNIA, 12.]

WATERCOURSE. — To CONSTITUTE A WATERCOURSE, it is not necessary that water shall flow in the bed or channel of the stream all the year.

MUNICIPAL CORPORATION, WHEN IT DOES PROVIDE WATERWAYS, MUST PROVIDE SUCH AS ARE SUFFICIENT to carry off the water which may reasonably be expected to accumulate.

MUNICIPAL CORPORATION IS LIABLE FOR WATER PRECIPITATED UPON THE LANDS OF A PRIVATE PROPRIETOR by an extraordinary and unusual rainfall, and the want of proper repairs in sewers constructed by the municipality, if such sewers, when in proper repair, were of sufficient capacity to carry off all the water which fell. Proper and sufficient sewers having been constructed, the land-owner had the right to assume that they would be repaired when broken or dilapidated.

MUNICIPAL CORPORATIONS — CONTRIBUTORY NEGLIGENCE. — A LOT-OWNER IS NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE because he does not repair or remove obstructions from a sewer which it was the duty of a municipal corporation to keep in proper repair.

MUNICIPAL CORPORATIONS. — THE FACT THAT A CITY LOT IS BELOW THE GRADE OF A STREET will not preclude its owner from recovering compensation of the city for injuries to such lot and the improvements thereon, resulting from the failure of the city to keep a sewer in proper repair, if such sewer, when so repaired, would have prevented such injury, notwithstanding the lot was below the grade.

MUNICIPAL CORPORATIONS — CONTRIBUTORY NEGLIGENCE IN BUILDING ON A LOT BELOW THE GRADE OF A STREET. — When sewers already constructed by a city are sufficient, if kept in repair, to protect from injury improvements placed on a lot below the grade of the street, the lot-owner is not guilty of contributory negligence in erecting such improvements, and may therefore recover of the city if they and the lot are injured by its failure to keep such sewers in proper repair.

MUNICIPAL CORPORATIONS ARE LIABLE where the property of private persons is flooded either directly or by water being set back, when this is the result of the negligent failure to keep gutters, drains, culverts, or sewers in repair and free from obstructions, whether the lots are below the grade of the street or not.

MUNICIPAL CORPORATION IS NOT RELIEVED FROM LIABILITY FOR DAMAGES resulting from a sewer being broken or out of repair, by the fact that the water which caused the damage may have been diverted into the sewer by means of a dam built by persons who constructed another sewer for the city. Such persons act under the direction of the city authorities, and if their negligent mode of conducting their work causes loss to a third person, the city is answerable.

MUNICIPAL CORPORATIONS. — THERE IS NO NECESSITY FOR PRESENTING TO a board of supervisors or common council claims for damages for negligence in not keeping a sewer in proper repair, before bringing suit on such claim.

PRACTICE ON APPEAL. — EVERY TRANSCRIPT ON APPEAL SHOULD CONTAIN ALL THE MATTERS on which the cause is to be determined, and it is not proper for counsel to make another transcript a part of the case by stipulating that the evidence and findings in such other transcript, so far as pertinent, shall be considered in the case on appeal.

George Flourney, Jr., for the appellant.

William H. Bodfish, and W. C. and I. Burnett, for the respondent.

THORNTON, J. This is an action to recover of the city and county of San Francisco damages for neglect in keeping a sewer in repair, whereby the plaintiff was injured.

At the time that the injury occurred, and for some years before, the plaintiff was the owner of a lot of land situate at the southwesterly corner of Eighteenth and Fair Oaks streets, 27 feet on Eighteenth Street and 101 feet on Fair Oaks Street, the lot lying east of Fair Oaks, and constituting a parallelogram of 27 by 101 feet, on which he had, in 1877, built a house.

The material facts are found by the court as follows: "That prior to October 19, 1883, defendant had authorized and caused a public street in said city and county of San Francisco, called Eighteenth Street, along and near the line of which a natural stream of water had been accustomed to flow and run, and many other streets crossing Eighteenth Street, to be graded greatly above the natural level of the ground there, from Folsom Street westerly as far as Douglass Street, and thereby the waters of said natural stream were prevented from flowing in the bed of said stream, and said bed filled with earth in many places, and the waters flowing from a

large water-shed to the westerly of Church Street intercepted and prevented from reaching said bed as they had been accustomed to do, and had authorized and caused a sewer to be constructed and laid down along Eighteenth Street from Folsom to Douglass streets, and other sewers along the streets crossing Eighteenth Street, and that by means thereof the waters that formerly flowed in said natural stream and from said water-shed were, until the time of the acts of negligence hereinafter referred to, received into and conducted in said sewer in Eighteenth Street, and conveyed therein to a point at Folsom Street, and from thence said waters found their way into Mission Bay and the bay of San Francisco, and that said waters would have continued to be so conveyed and to find their way until after the injuries herein mentioned, but for the acts of the defendant, and of her servants and agents, as hereinafter mentioned; that plaintiff, after October 19, 1883, and before the time of the injuries hereinafter mentioned, erected upon said lot of land a dwelling-house and carpenter-shop, and had improved said lot by grading it, and at the time of such injuries had on said premises and was the owner of the lumber, tools, paints, oils, finishing lumber, moldings, doors, windows, material, rails, and property hereinafter mentioned, which tools constituted a chest of carpenters' tools, and said material included casings, among other things, and at the time of said injuries plaintiff was conducting business at his trade as a carpenter in said shop, and was residing on said premises with his family; that the foundation and shop floor mentioned in the fourth paragraph of the first count of the complaint constituted part of the dwelling-house and shop aforesaid; that there were no outhouses on said land; that within two years before the commencement of this cause, and up to the time of the injuries hereinafter mentioned, said sewer in Eighteenth Street to the westerly of Guerrero Street, through the negligence of the defendant and carelessness of the defendant in omitting to clear or repair the same, became, and until and including the times when such injuries occurred continued to be, obstructed, insecure, broken, and, with said sewers in said streets crossing Eighteenth Street to the westerly of Guerrero Street, incapable of conveying away the waters, drainage, and sewage received into the same, and thereby large volumes of water and sewage collected in said sewers westerly from Guerrero Street were conducted to and discharged with great and increased

violence upon the said land and premises of the plaintiff, between March 1, 1884, and at divers times between said dates, that is to say, on the seventh, eighth, and ninth days of March, 1884, and on the eleventh and twelfth days of April, 1884, whereby said water and sewage greatly devastated and injured the said land, dwelling-house, and shop during the period last aforesaid, and injured said building and shop, and caused said building to settle and become out of plumb, and saturated the soil of said lot and partially filled the basement of said house and shop with water, and broke said house and the other property hereinafter mentioned, wetted and injured and damaged, by means whereof the said dwelling-house and carpenter-shop, and the foundations thereof, and said land, were damaged in the sum of five hundred dollars, and other property then on said premises damaged, that is to say, five thousand feet of lumber, to the amount of one hundred and twenty dollars, paints and oils to the amount of fifty dollars, finishing lumber, cases, and moldings to the amount of one hundred dollars, doors, windows, and blinds to the amount of seventy dollars, one ton of nails to the amount of one hundred dollars, carpenters' tools in carpenter-shop to the amount of one hundred and fifty dollars; that said injuries were in part caused by the washing of sewage and earth into and upon said lot and into said house and shop by and with said water; that the amounts above mentioned include the values of all the injuries to the plaintiff's said property by means of the facts herein stated; that defendant, at all times and during the whole period herein referred to, had notice of the then condition of said Eighteenth Street and the sewer therein, and of the streets crossing said street, and of the sewers therein, as hereinbefore shown, and that such notice was also given to and possessed by, and the knowledge of such condition had, by the defendant's board of supervisors and mayor, and her superintendent of public streets, highways, and squares, at all said times and during said period; that there was no necessity for causing said discharge of waters, or of said sewage, or of said earth, upon the land of plaintiff, but by a proper repair and claiming [cleaning] of said sewers the whole thereof could easily have been conducted past the land of the plaintiff and discharged into Mission Bay and the bay of San Francisco without doing any damage to plaintiff's said property; that the damage, loss, and injury hereinbefore mentioned was not, nor any part thereof, caused by the negligence

of the plaintiff, and that plaintiff was not negligent in any particular in the premises."

It is urged that there was no proof that there was such a watercourse as is alleged and found.

The evidence is ample to bring it within the definition as given by all the cases. It is not necessary that the water shall run in the bed or channel of the stream all the year. There is evidence of bad breaks and water flowing in the bed.

But whether the water that did the damage came from a watercourse or from the surface, the liability would be the same. The liability here rests in the duty of the city to keep the sewers in repair, which duty, after ample knowledge of it, was grossly neglected.

It was the duty of the city, when it does provide waterways, to provide such as are sufficient to carry off the water that might reasonably be expected to accumulate. The rule is so laid down in *Damour v. Lyons City*, 44 Iowa, 282; approved and followed in *Powers v. City of Council Bluffs*, 50 Iowa, 201, 202. See *Mayor of New York v. Bailey*, 2 Denio, 433. We think the rule above stated correct, and approve it.

But it is said that the precipitation which caused the injury herein was extraordinary and unusual, could not reasonably have been expected, and therefore the defendant is not liable. This might be true if the sewers had not been of sufficient size to carry off all the water which was so extraordinarily and unusually precipitated, but the evidence is clear and direct that the sewers, if they had been kept in order, were of a capacity to carry off all the water which did fall. This shows that the agents and servants by which the city acted in constructing the sewer anticipated that large sewers would be required to carry off the rainfalls which might be looked for; and it could not be allowed the defendant to invoke this defense, when it had in advance made provision for the very event that did occur. It could not harmonize with reason and justice to allow such defense for negligence. The contention would amount to this: Though the sewers were made large enough to carry off all the water, though the extraordinary rainfalls were anticipated, yet inasmuch as the fall of water was unusual and extraordinary, the defendant is not liable. Sufficient provision having been made in advance for anticipated events, it would be inconsistent with all just and sound reason and the settled principles of law to hold one excused when the provision has become insufficient by reason of

indifference to monitions and inexcusable neglect. The plaintiff had a right to assume that the agents of the city would attend to duty, and repair the broken and dilapidated sewer. He had a right to act on this assumption. Certainly there was no duty on him to remove the obstructions from the sewer and repair it himself, or be chargeable with negligence if he did not do so. It would have cost a considerable sum of money to have put the sewer in a proper condition,—maybe more than his property was worth.

The evidence shows that the foundation of the house was below the grade of Eighteenth Street. The floor of the basement was four feet six inches below the level of the sidewalk on Eighteenth Street, on which the house fronted. The plaintiff moved into the house in January, 1884, though it was not completed until the month of March following. The lot was graded in October, 1883, about three feet higher than the former level. The front of the house was set back about five feet from the edge of the sidewalk (on Eighteenth Street), and was reached by steps going up from the sidewalk to the front door.

Though the lot was below grade, still the sewer, when in proper condition and unbroken, would have carried off the water which did the injury. Plaintiff was guilty of no negligence in building where he did, and his right to recover would not be impaired.

When the plaintiff built his house, in 1883 and 1884, he had, as said above, a right to act on the assumption that the city authorities would keep the sewer in good repair. The sewer being sufficient in capacity to carry all the water, the plaintiff might well consider that he could remain securely on the land where he had built his house, and would not be guilty of negligence which would bar a recovery. On this subject, see *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; 53 Am. Dec. 816; *Barton v. Syracuse*, 36 N. Y. 54; *Ashley v. Port Huron*, 35 Mich. 299; 24 Am. Rep. 552, and cases there cited.

Dillon states that "there is a municipal liability where the property of private persons is flooded, either directly or by water being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction, and this, whether the lots are below the grade of the streets or not. The cases support this proposition with great unanimity."

Counsel for defendant urges that if the damages to plaintiff

had resulted from the natural flow from the adjoining high ground, he cannot recover. He further says, "It does not appear that this was not so."

The evidence on the point urged was before the court below, and it held that the damage was caused by the water which flowed from the broken sewer, and not from the adjoining higher ground. There is evidence to sustain the finding, and we do not feel at liberty to disturb it.

It is urged that the injury was caused by certain parties who had been constructing a sewer, who built a dam which diverted the water and caused it to flood plaintiff's land. Sewers are built under the direction of the city authorities; and if the parties building it are so negligently conducting their work as to cause loss and injury to a third person, the city is liable. It is no excuse to the city that a dam thus built caused the damage.

If there was such a dam, there is evidence which shows that the superintendent of streets had knowledge of it. There was a contractor building a sewer on Eighteenth Street, in February, 1884, and if he constructed any dam there, the city authorities had an opportunity of seeing and knowing it; for the uncontradicted evidence shows that the superintendent or his deputy was there, when the sewer was being constructed, every morning. The only person building a sewer was a contractor, McDonald, who was a witness in the case, and if any such dam was built, he or his employees built it; and he testifies that the superintendent of streets or his deputy was there every morning to inspect the work. The superintendent thus knowing of the dam must have known it would have diverted the water in the rainy season. Knowing it, he should have caused it to be removed. His failure to remove it was negligence of duty; and the city, under the circumstances, should not be relieved in consequence of this dam of its responsibility in this case. Further, the dam being on the east side of Eighteenth Street, it does not appear with sufficient clearness that it caused the damage, to authorize this court to regard its existence as impairing plaintiff's right to recover herein.

It was not requisite to present the claim sued on herein to the board of supervisors of the city and county before instituting suit upon it: *Bloom v. San Francisco*, 64 Cal. 503; *Lehn v. San Francisco*, 66 Cal. 76.

A stipulation appears in the record in this case to the effect that all the evidence and findings appearing in the statement

of the case in the action of *Cook v. City and County of San Francisco*, now here on appeal, that may be pertinent herein, shall be considered in this cause upon the appeal from the order denying defendant's new trial, as though the same were embodied in the statement on motion for a new trial in this case.

Under this mode of bringing a case here on appeal, the work of counsel is imposed on this court. This court is called on to read two transcripts in different cases, to decide and determine what evidence is pertinent in one case but not in the other, and what is not. This labor should be performed by counsel, and not by the court. Counsel should not turn over their work to be performed by the court. The transcript in every case should contain in it all the matter on which it is to be determined, and the court ought not to be called on to read two transcripts to determine one case, and find out and cull from one transcript what would be pertinent in the case under consideration. Certainly counsel should recollect the amount of labor imposed on this court, and do everything incumbent upon them to lighten it. This court might well have refused to consider this cause, and have affirmed the judgment and order without consideration, by reason of the facts just set forth. In its consideration more time has been consumed on account of the unusual mode of presenting the case in the record. Though this case has been determined, another may not be treated in the same way.

The evidence is sufficient to justify the findings.

We find no error in the record.

Judgment and order affirmed.

WATERCOURSE, WHAT IS. — For a definition of what constitutes a water-course, see *Byrns v. Minneapolis etc. Ry Co.*, 38 Minn. 212; 8 Am. St. Rep. 668, and note.

MUNICIPAL CORPORATIONS — LIABILITY FOR DAMAGES CAUSED BY PRECIPITATED WATERS. — A municipal corporation is liable in damages for collecting water in artificial channels, and casting it in a body upon the property of another; but is not liable for consequential damages caused by grading, etc., unless the work is negligently done: *Davis v. Crawfordsville*, 119 Ind. 1; 12 Am. St. Rep. 361, and note 362, 363. For the liability of a city for negligence with respect to its sewers, see note to *Weller v. St. Paul*, 12 Am. St. Rep. 754; *Seifert v. Brooklyn*, 101 N. Y. 136; 54 Am. Rep. 664, and note 671, 672; *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552, and note 556, 557.

[IN BANK.]

TAFFT v. PRESIDIO RAILROAD COMPANY.

[84 CALIFORNIA, 181.]

CORPORATION. — THE UNAUTHORIZED TRANSFER OF THE STOCK OF A CORPORATION is a wrong done to the owner of such stock for which not only the person who makes it, but any one knowingly assisting in the wrong, is responsible.

CORPORATIONS. — TRANSFER OF STOCK FROM A PRINCIPAL TO HIS AGENT, ON THE BOOKS OF A CORPORATION, is not authorized by the fact that the principal has given the agent general power of attorney empowering him, among other things, "to sell, dispose of, transfer, and deliver all or any of my interest in the capital stock of any association, bodies corporate or politic."

CORPORATION IS LIABLE FOR THE TRANSFER OF A CERTIFICATE OF STOCK when it accepts the surrender of such certificate, and issues a new certificate therefor to and in the name of an agent of the owner of the certificate, when the certificate is not indorsed, either by the owner or by the agent, though the agent had a general power of attorney which empowered him to sell, transfer, or deliver all the interest of the principal in the capital stock of any corporation, if the by-laws of the corporation declare that the stock shall be transferred upon proper assignment and delivery to the assignee of the certificate. Every stockholder has the right to expect that the corporation will observe its own by-laws, and will not transfer his stock unless it is assigned to the assignee.

Jarboe, Harrison, and Goodfellow, and Lloyd and Wood, for the appellant.

Wilson and Wilson, and Samuel M. Wilson, for the respondent.

SHARPSTEIN, J. On the twenty-second day of October, 1874, the plaintiff executed to Arthur W. Bowman a power of attorney authorizing him to transact her business generally and particularly, "to invest all and singular such sums of money as may be in his hands belonging to me in such securities and upon such terms as he may think fit and for my interest; to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate or politic, and to represent me and vote for me at any and all meetings of stockholders of any and all corporations in which I now or may hereafter hold or own shares of capital stock; and represent me and my shares of stock aforesaid in all matters and things touching the said shares and the acts and doings of the said corporations; also to bargain and agree for, buy, sell, mortgage, hypothecate, and in and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action;

and to make, do, and transact all and every kind of business of whatever nature and kind soever; . . . giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present."

This power of attorney continued in force until October 18, 1884, when it was revoked.

On and prior to the twenty-third day of May, 1882, the plaintiff was the owner of two hundred shares of the capital stock of the defendant corporation, which stood in her name on the books of the corporation, and for which a certificate, numbered 31, had been issued to her.

The defendant corporation was organized under the laws of this state for profit. Its by-laws regulating transfers of stock, so far as relevant to this case, are as follows:—

"Sec. 2. Every transfer of stock, or of the certificates above provided to be issued, shall be entered in the transfer-books, to be kept by the secretary, by an entry showing to and by whom transferred, the numbers and designations of the shares, and the date of the transfer, and duly attested by the secretary. No transfer shall be valid except as between the parties, unless made as in this section provided.

"Sec. 3. The stock shall be transferable as in the last preceding section specified, and upon the books of the corporation, upon proper assignment and delivery to the assignee of the certificates above provided for. . . .

"Sec. 4. The surrendered certificate shall in all cases be canceled by the secretary before issuing a new one in lieu thereof."

On the nineteenth day of August, 1882, A. W. Bowman presented to the secretary of defendant the certificate of stock No. 31, issued to the plaintiff as aforesaid, but not indorsed by her or by any other person for her; and at the same time presented to the secretary said power of attorney from the plaintiff, and demanded a transfer to himself, in his own name, of the two hundred shares of stock represented by certificate No. 31, then standing in her name on the books of the company. The secretary then received from Bowman the certificate No. 31, without indorsement, canceled it, made the transfer on the books as requested, and, in lieu of certificate No. 31, issued to Bowman, in his own name, two certificates

of one hundred shares each, numbered respectively 211 and 212. At the time of this transfer the plaintiff was absent from this state, and actually knew nothing of it, and had authorized it in no other way than by said power of attorney.

On said nineteenth day of August, 1882, Bowman was largely indebted to divers persons in this state, and was then, and ever since has been, insolvent.

Thereafter, for a valuable consideration, Bowman assigned and transferred said certificates numbered 211 and 212 to the California Safe Deposit and Trust Company, a corporation, which took the assignment and transfer thereof in good faith without notice of the rights of the plaintiff. Plaintiff had no notice of this transfer and assignment of certificates Nos. 211 and 212 until after they were made, and did not authorize the same otherwise than by said power of attorney.

Bowman was a director of the defendant corporation from January, 1882, until October, 1884.

The defendant corporation never had any actual or presumptive notice that Bowman procured the transfer of said stock to himself for his own use, or that he intended to convert it to his own use, or to use it in any way prejudicial to the rights of the plaintiff, unless such notice may be presumed from the fact that he was one of the directors of the defendant corporation as above stated.

The action was brought by the plaintiff to recover from the defendant damages for an alleged conversion of said two hundred shares of stock, and the court found,—“8. That said defendant did, prior to the commencement of this action, convert and appropriate said two hundred shares of stock of the defendant, so belonging to plaintiff, and has wholly refused to return the same or any part thereof to plaintiff; and that, at the time of such conversion, the same was of the value of ten thousand dollars.”

Judgment was accordingly rendered in favor of plaintiff for ten thousand dollars and costs.

Defendant moved for a new trial, on the ground, among others, of insufficiency of the evidence to justify the decision. From the order denying the new trial, and also from the judgment, the defendant appeals.

The decision turns upon the construction of the power of attorney held by Bowman. If it conferred on him the power to transfer to himself the stock of his principal, then the court below erred in finding that appellant converted respondent's

stock. Otherwise, not. The authority conferred by the power of attorney is very general, but does not authorize the attorney to do anything except for and in the name of his principal. The exchange of her shares for an equal number of shares to be issued to himself is not directly, nor in our opinion indirectly, authorized by anything contained in the power of attorney. And it was not done for or in the name of the principal, nor in accordance with the by-laws of appellant or the provision of the code that such shares of stock may be transferred by indorsement by the signature of the proprietor or his attorney or legal representative: Civ. Code, sec. 324.

Here the transfer in controversy was made without indorsement by the signature of the proprietor, or her attorney, or her legal representative.

In *Stockpole v. Arnold*, 11 Mass. 27, Parker, C. J., said: "No person, in making a contract, is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs. This principle has long been settled, and has been frequently recognized; nor do I know an instance in the books of an attempt to charge a person as the maker of any written contract appearing to be signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal on whose behalf he gave his signature."

In this case there was no indorsement by signature, such as the law requires to effect a valid transfer, and if there had been, the agent's signature, without stating the name of the principal on whose behalf he gave his signature, would not have authorized the cancellation of the principal's certificate and the obliteration of all evidence of her ownership of stock.

Appellant is certainly in no better position now than it would be if the agent had indorsed the certificate by his own signature, without stating the name of his principal.

Respondent had a right to rely on the observance by appellant of its own by-laws and the laws of the state in the transaction of its business. Appellant was under no obligation to permit a transfer until the requirements of its by-laws and of the laws of the state were fully complied with.

"A purchaser of stock does not receive the certificate of his vendor, but a new one, made out in his own name, and reciting nothing contained in the former. He is therefore protected in the enjoyment of his purchase, even though there was no right to make the transfer to him. For this reason an unau-

thorized transfer is a wrong done to the owner of stock, for which not only the person who makes it, but any one knowingly assisting in the wrong, is responsible. That a bank or other corporation, and also these defendants, are trustees to a certain extent for stockholders,—that is, for the protection of individual interests,—cannot be denied. They are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation. From this it results that they may rightfully demand evidence of authority to make a transfer before they permit it to be done. Their own safety requires that they be satisfied of the right of the person proposing to make a transfer to do what he proposes. Generally, sufficient evidence of such right is found in the possession of legal title to the stock. Yet it is well settled that it is not in all cases sufficient, notwithstanding that the true equitable ownership may be in some other than the holder of the legal right, and the transfer may be a gross wrong to such an equitable owner. To that wrong the corporation or keepers of the register make themselves parties, if, with knowledge that there is no equitable right to transfer, they permit it to be done": *Bayard v. Farmers' and Mechanics' Bank*, 52 Pa. St. 232.

In *Selover v. American Russian etc. Co.*, 7 Cal. 266, it is held that "where the *feme sole* becomes the owner of shares of stock in a company, and afterward marries, and after marriage the husband and wife execute an indorsement on the certificate of stock, purporting to sell the same to A, without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record, that such a sale was void as against a subsequent purchaser, under an instrument duly signed and acknowledged."

No indorsement is not better than a defective indorsement, which was held in that case to be wholly ineffectual. If an indorsement had not been considered necessary in that case, the court would not have written an elaborate opinion to prove that the indorsement was not such as the law required. It would have disposed of the case by holding that as no indorsement was required, it was immaterial whether the attempt to indorse had been successful or otherwise.

After a careful inspection of the power of attorney, we are unable to discover any clause which even constructively authorized Bowman to convert the shares of his principal into

shares of his own. And that is precisely what he did, by the assistance of the appellant, without which he could not have converted them.

Appellant invokes the familiar rule, "that where one of two innocent persons must suffer, the loss shall fall on him who has afforded the opportunity for the same." But it was the appellant, in this case, who afforded the agent an opportunity to inflict loss upon his principal, and also aided him in inflicting it.

As was said in *Bayard v. Farmers' and Mechanics' Bank*, 52 Pa. St. 232, "with them [the corporation] was the registry, and transfers could be made only with their consent, by the surrender of the certificates and the issue of new ones."

We think it clear that a transfer not made by the party transferring, or some agent duly authorized, can have no effect. And we think, in this case, the transfer was not made by the owner of the stock, or by an agent duly authorized to make it as it was made; and as respondent was divested of her property by the unauthorized act of appellant, it must be held responsible to her for the damage she has suffered in consequence of such wrongful act.

Judgment and order affirmed.

Rehearing denied.

CORPORATIONS — TRANSFER OF STOCK. — Transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at the peril of the corporation: *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 587.

AGENCY — RIGHT OF AGENT TO ACQUIRE INTEREST. — A power of attorney authorizing an agent to sell his principal's property does not authorize the agent to acquire an interest in the purchase: *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722; *Ames v. Port Huron etc. Co.*, 11 Mich. 120; 83 Am. Dec. 731, and note.

NORTON v. WHITEHEAD.

[84 CALIFORNIA, 252.]

ASSIGNMENT OF MONEYS TO BECOME DUE. — If one who is performing work under a contract executes an assignment of all moneys due or which may become due him on any work he may perform, and which assignment declares it shall remain in force until all the notes which are due or which are to become due to the assignee are paid, and is supplemented with a power of attorney, purporting to be irrevocable, authorizing the assignee to collect all sums of money which are and shall be due by reason of his performance of the contract, such assignment and power, though the contract contained a clause prohibiting its assignment, operate to transfer to the assignee all moneys necessary to pay notes due to him from the assignor, though executed after the making of the assignment.

DEATH OF PRINCIPAL, WHEN DOES NOT REVOKE POWER. — Power of attorney which purports to be irrevocable, and which authorizes the agent to draw all moneys which shall become due the principal on a specified contract, and which was made pursuant to an understanding with the agent to furnish, from time to time, all moneys necessary to carry on the work under such contract until it was completed, gives the agent an interest in the subject-matter, and therefore is not revoked by the death of the principal, where it was preceded by an assignment of the same moneys which the power of attorney authorized the agent to collect.

W. C. Burnett, W. H. H. Hart, and Aylett R. Cotton, for the appellants.

Henry M. McGill and D. H. Whittemore, for the respondent.

VANCLIEF, C. On the ninth day of June, 1885, the deceased, D. Finley, entered into a written contract with the board of state harbor commissioners, whereby he agreed to repair (re-face) two sections of the sea-wall on the water-front of the city of San Francisco, the work to be commenced within 20 days and to be completed within 150 days from date of the agreement. The work was to be paid for by drafts on the harbor-improvement fund, upon monthly estimates of the value of the material used and of the work performed at the rates agreed upon, seventy-five per cent of such value to be paid monthly, and the remaining twenty-five per cent to be paid when the work should be completed. The contract contained the provision that it should not be assignable without the written consent of the board, party of the first part.

During the progress of the work, Finley, for the purpose of obtaining money to carry on the work, borrowed from the plaintiff, at different times, considerable sums of money, for

most of which he gave plaintiff his promissory notes. Plaintiff was employed a portion of the time as assistant foreman on the work, for which he was to be paid what his services were reasonably worth.

On February 8, 1886, Finley executed to plaintiff a writing, of which the following is a copy: —

“SAN FRANCISCO, February 8, 1886.

“TO ALL WHOM THIS MAY CONCERN: I hereby assign, transfer, and set over to W. H. Norton, or assigns, all moneys due me, or which may become due to me, on any work I may perform. And this assignment to remain good and in full force until all notes due, or which are to become due, to W. H. Norton, or his assigns, from me are paid, and when said notes are paid this instrument to be null and void.

“DAVID FINLEY.”

On March 27, 1886, Finley executed to plaintiff a power of attorney, of which the following is a copy: —

“Whereas, I, David Finley, of the city and county of San Francisco, state of California, did, on the ninth day of June, A. D. 1885, enter into a contract with the board of state harbor commissioners of the state of California to re-face the outer slope of sections one (1) and two (2) of the sea-wall on the water-front of the city and county of San Francisco, state of California;

“And whereas I am now desirous that all moneys that have become or may become due to me by reason of my performance of said contract shall be paid to W. H. Norton of said city and county, —

“Now, therefore, to carry out my said desire, I appoint said W. H. Norton my true and lawful attorney, irrevocable, for me, and in my name, place, and stead, to collect and receive all sums of money which are or shall be due, owing, or payable to me by reason of my performance of said contract made by me with said board of state harbor commissioners as aforesaid.

“Giving and granting unto my said attorney full power and authority in and about the premises, and in my name to make, execute, and deliver all and every receipt and instrument required to the secretary of said board, or to said board, hereby ratifying, confirming, and holding valid all that my said attorney shall lawfully do by virtue of these presents.

“In witness whereof I have hereunto set my hand and seal this twenty-seventh day of March, A. D. 1886.

“DAVID FINLEY. [SEAL.]”

On October 4, 1886, Finley gave plaintiff the following letter of introduction:—

“SAN FRANCISCO, Oct. 4, 1886.

“GEORGE TILGHAM, Esq., Secretary Board of State Harbor Commissioners.

“Sir,—This will introduce to you Mr. W. H. Norton, whom I hereby empower (and to whom I have given a special power of attorney) to receive and receipt for all warrants for money due me on my contracts with the board of state harbor commissioners for facing up sections 1 and 2 of the sea-wall with rocks.

DAVID FINLEY.”

On November 9, 1886, before the work was completed, Finley died intestate, and the defendant Whitehead was appointed administrator of his estate, and, as such administrator, Whitehead completed the work on the sea-wall according to the contract and to the satisfaction of the board of harbor commissioners.

At the time of the commencement of this action twenty-five per cent of the contract price of the work remained unpaid, amounting to \$3,225.

The plaintiff claims that Finley was indebted to him at the time of his death, and at the time the work was completed, on account of said loans, in a sum more than equal to the \$3,225 balance due for said work, and the principal object of this action is to compel the board of state harbor commissioners to draw their warrant for said balance directly in favor of the plaintiff, as the estate of Finley is alleged to be insolvent.

The defendants contended that plaintiff was not entitled to this relief, and that the warrant for the unpaid balance due on the contract should be drawn in favor of the administrator of Finley's estate.

The court gave judgment for the plaintiff, and the defendants appeal from the judgment, and from an order denying their motion for a new trial.

Among the findings of fact by the court are the following: “That during the progress of said work said Finley, for the purpose of obtaining money to complete said contract, borrowed from the plaintiff the sum of \$2,111.46, and gave plaintiff the promissory notes mentioned in the amended complaint herein, and in May and June, 1886, the further sum of \$239.40, for which no note was given; that said Finley employed the said plaintiff as foreman of said work and agreed to pay the

reasonable value of said services, and that the reasonable value of said services is the sum of \$768.75; that to secure the said sums of \$2,111.46 and \$768.75 said Finley assigned to plaintiff all the moneys due or to grow due on said contract, and made, constituted, and appointed said plaintiff his attorney in fact, by a power of attorney, irrevocable, and coupled with an interest to collect and receive the money due or to grow due on said contract, and that there is due plaintiff for the performance of said contract, for money so advanced, and for labor so performed, the sum of \$2,880.15, together with interest on the said sum of \$1,572 from May 2, 1886, at the rate of one per cent per month, and on said sum of \$300 from June 21, 1886, at the rate of one per cent per month, making a total interest of \$346.96, no part of which, principal or interest, has been paid, and that there is due from the said board of state harbor commissioners on said contract the sum of \$3,225; that on the ninth day of October, 1886, the said Finley agreed that the said sum of \$3,225 should be paid to plaintiff to reimburse said plaintiff for the amounts so due to plaintiff from said Finley, and assigned said sum to plaintiff, but did not assign said contract; that at all the times subsequent to the thirty-first day of March, 1886, said board of state harbor commissioners knew of said assignment and power of attorney."

The only attack worthy of consideration made upon these findings is based upon the ground that the evidence does not justify the finding of the assignment by Finley to plaintiff of the former's right to the money to become due on the sea-wall contract, and particularly of the last installment of twenty-five per cent thereof, as security or otherwise.

To sustain this finding it is necessary to show that the power of attorney from Finley to plaintiff was so coupled with an interest as to prevent its revocation by the death of Finley; and whether it was so, or not, is the pivotal question in the case.

I think the assignment of February 8, 1886, the power of attorney, with its recitals, of March 17, 1886, and the letter of introduction to the secretary of the board, of October, 4, 1886, construed in the light of the circumstances under which they were executed, and the subsequent conduct of the parties in relation thereto, as proved by J. M. Polk, A. C. Paulsell, J. C. L. Wadsworth, and John H. Wise, are sufficiently evincive of an assignment, legal or equitable, giving plaintiff an "interest in the subject-matter over or concerning which the power was

to be exercised": *Frink v. Roe*, 70 Cal. 309; *Hunt v. Roumanier*, 8 Wheat. 175.

The subject-matter upon which the power was to be exercised was "all moneys that have become or may become due to me [Finley] by reason of my performance of said contract," which I desire "shall be paid to W. H. Norton [plaintiff] of said city and county." At the time this power of attorney was executed, the plaintiff held Finley's written assignment of all such moneys due or to become due for any work he might perform, dated February 8, 1886, which assignment was "to remain good and in full force until all notes due, or which are to become due, to W. H. Norton or his assigns from me, are paid," and to become null and void when said notes are paid.

It is contended by appellants' counsel that the security by this assignment was limited to notes in existence at the time it was made, and that all such notes had been paid before the execution of the power of attorney. But the language seems broad enough to embrace notes thereafter to be made; and in view of the circumstances under which it was made, and the subsequent conduct of the parties, I think the trial court properly so construed it. It was deposited with the secretary of the board of harbor commissioners as evidence of plaintiff's right to all moneys to become due to Finley, and it was allowed to remain there, after the power of attorney was executed, and until after the death of Finley; and the evidence strongly tends to show that the power of attorney was in like manner deposited with the secretary of the board.

If the assignment had fully discharged its functions, or was to be superseded by the power of attorney, why was it not delivered up or canceled when the power of attorney was executed? At the time the assignment was made, plaintiff was on Finley's bond for the performance of the contract, and was "backing him" with money to enable him to perform it; and the defendant, Whitehead, testified that Finley was indebted to Norton all the time during the year 1886.

It is to be fairly inferred from the evidence that it was the continuous understanding between plaintiff and Finley that the former was to furnish, from time to time, all money necessary to carry on the work until it was completed, and that he did so; and it appears that plaintiff was never fully paid at any time while the work was being done.

The power of attorney itself indicates more than that plaintiff was empowered to receive the money merely as Finley's agent. The second recital indicates that the object of the power was to enable plaintiff thereby to obtain payment of money due him. The language of this recital is out of place, and entirely superfluous, if nothing more was intended than to empower plaintiff to receive the money as Finley's agent.

The power of attorney also provides that it is irrevocable; and although this is not conclusive, it nevertheless tends to prove that the parties understood that plaintiff had an interest in the subject-matter upon which it was to operate.

Counsel for appellants further contend, on the authority of *Hunt v. Rousmanier*, 8 Wheat. 175, that conceding that plaintiff had such an interest in the subject-matter of the power of attorney as would have deprived Finley of the power to revoke it during his lifetime, yet inasmuch as plaintiff, in receiving and receipting for the warrants and money, must have acted in the name of Finley, he could not have done so after Finley's death.

I think the learned counsel mistaken in assuming that it was necessary that plaintiff should receive or receipt for the warrants or the money in the name of Finley. Upon the construction of the assignment, power of attorney, and letter of October 4th, properly, as I think, given by the trial court, the plaintiff was entitled to receive and receipt for the warrants or money in his own name, both before and after the death of Finley; and such receipt, in his own name, in connection with the papers above named, would have protected the board of harbor commissioners and the state against all demands of Finley or his administrator for the same warrants or the money for which they were drawn. It is true that the power of attorney expressly authorized the plaintiff to act in Finley's name, but this detracted nothing from plaintiff's right to act in his own name as the assignee of Finley.

In the case of *Hunt v. Rousmanier*, 8 Wheat. 175, there was no sale nor assignment of any interest in the subject-matter (vessels at sea) of the power of attorney, by way of mortgage or otherwise. The bill shows that the complainant intentionally and expressly declined to take a mortgage of the vessels. There was, however, a proviso in the power of attorney reciting that it — the simple power of attorney — was intended to secure certain promissory notes, and was to be void on their payment; but the court held that this proviso did not have the

effect of a sale, assignment, or mortgage of any interest in the vessels, and having no such interest, the complainant could do nothing except to exercise his simple power of attorney to sell, which could only be done in the name of his constituent, who was dead, and therefore could not be done at all, as he could not sell in the name of a dead man. In the case at bar, the court has found, upon evidence substantially tending to prove the finding, not only that Finley executed to plaintiff an irrevocable power of attorney, but also that "said Finley assigned to plaintiff all the moneys due or to grow due on said contract," to secure the payment of the money found due the plaintiff, with interest, amounting at the date of the judgment to \$3,225.

By no possibility could the appellants have been injured by the overruling of their objection to admitting in evidence plaintiff's letter of November 16, 1886, to the board of harbor commissioners. The only effect that letter could have had was to show that, by waiving his right to warrants numbered 64 and 65, dated November 4, 1886, Finley did not waive his right to warrants thereafter to be drawn. There was and is no pretense of any such waiver.

I think the judgment and order should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

AGENCY COUPLED WITH AN INTEREST IN THE AGENT is not terminated by the death of the principal: Note to *Cassiday v. McKensie*, 39 Am. Dec. 82, 83; *Knapp v. Alvord*, 10 Paige, 205; 40 Am. Dec. 241, and note. But the authority of an agent to receive and collect moneys for his principal, not coupled with an interest, ceases upon the death of the principal: *Weber v. Bridgman*, 113 N. Y. 600.

ASSIGNMENT OF DEMANDS TO BECOME DUE, and of expectancies, the validity of, in general, see note to *Field v. Mayor etc. of New York*, 57 Am. Dec. 440, 441.

LA RUE v. GROEZINGER.

[84 CALIFORNIA, 281.]

ASSIGNMENT OF CONTRACTS. — The Civil Code of California removes the restrictions formerly existing upon the power of parties to assign their ordinary contracts, though it does not render all contracts assignable regardless of their nature or effect, nor does it render null any agreement or prohibition the parties themselves may have made on the subject.

ASSIGNMENT OF A CONTRACT CANNOT BE MADE WHEN its nature is such that performance by another would be an essentially different thing from that contracted for. Hence an artist or author contracting to paint a picture or write a book cannot assign such contract so far as to authorize its performance by another.

CONTRACT, WHAT ASSIGNABLE. — Contract by which the owner of a vineyard is given the privilege of selling all the grapes which he may grow for a period of ten years from vines in such vineyard, the grapes to be sound, and to contain twenty-two per cent of saccharine matter, may be assigned by the vineyardist, there being no evidence that vines raised in the same vineyard by one man, containing the specified amount of saccharine matter, would probably be different from grapes raised there by another man.

OPTIONAL CONTRACT MAY BE ASSIGNED; therefore one who has the right but is under no obligation to sell the growth of his vineyard at a specified price may assign that right to another, to whom he has transferred the vineyard.

F. E. Johnston and E. W. McKinstry, for the appellant.

A. P. Catlin and Dennis Spencer, for the respondent.

HAYNE, C. This was an action for damages for the breach of a contract to buy grapes. The substance of the material portions of the contract was as follows: One Hopper agreed to sell all the grapes which he might raise during a period of ten years from the vines which were then growing, or which he might thereafter plant, in a certain vineyard. The grapes were to be "sound," and were to be gathered when they contained twenty-two per cent of saccharine matter, and to be delivered in boxes at the wine-cellar of the defendant, — the "first crop" to be delivered separately from the "second crop" of the same year. In consideration whereof, the defendant agreed to accept the grapes, and pay for them (after delivery) at the rate of twenty-five dollars per ton, in specified installments, — any advancements which might be made to draw interest at a given rate.

The parties performed this contract for five years. At the end of that time, viz., in October, 1885, Hopper conveyed the vineyard and assigned the contract to the plaintiff. At

time of the transfer, the "first crop" of that year was being delivered by third parties, who had made advances upon it. The plaintiff does not appear to have had anything to do with this crop. He gathered the "second crop" of the same year, however, and delivered it to the defendant, who accepted and paid for it. This crop, it will be observed, was grown during the ownership of Hopper, and consequently may be supposed to have received the benefit of whatever care and skill he may have been able to give to it. The crop of the following year was grown, gathered, and tendered by the plaintiff. The defendant refused to accept it, saying that he had no contract with the plaintiff, and was not buying grapes. The plaintiff thereupon sold the crop to the best advantage he could, and brought this action to recover the difference in price and the expenses of resale. The jury rendered a verdict in his favor for \$2,473.20, and judgment was entered accordingly. Afterward the court required him to remit \$119.20, as a condition of denying the defendant's motion for new trial. Such remission was made, and the defendant appeals from the judgment, and the order denying a new trial.

1. It is contended that the contract was not assignable.

The rule of the early common law as to the assignability of choses in action has been much changed in modern times. The Civil Code of this state provides that written contracts "for the payment of money or personal property" may be transferred by indorsement in the same manner as negotiable instruments: Sec. 1459. And there are other provisions, which are more sweeping, viz.: —

"Sec. 1044. Property of any kind may be transferred, except as otherwise provided by this article."

"Sec. 1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such."

These sections seem to do away with whatever restrictions there may formerly have been upon the power of the parties to assign their ordinary contracts. It is clear, however, that the provision cannot be construed to render assignable all contracts whatever, regardless of their nature or effect, but must be taken with some qualification.

In the first place, it was not intended to render null any agreement that the parties may have made on the subject. Hence, if the contract itself provides in terms that it is not

transferable, it certainly cannot be transferred, although it otherwise might be so. Leases, and the tickets usually issued by railroad companies, are familiar instances of this. Upon the same principle, although a contract may not expressly say that it is not transferable, yet if there are equivalent expressions, or language which excludes the idea of performance by another, it is not assignable. Of this character is the case of *Shultz v. Johnson*, 5 B. Mon. 497, which is much relied upon for the appellant. There the defendant agreed to buy from one Johnson successive crops of hemp, "of his own raising"; and it was held that the defendant could not be compelled to accept hemp raised by Johnson's administrator. The court said that "the question . . . in every case must turn at last upon the intention of the parties," and that the phrase "of his own raising" meant that the hemp was to be raised by him or under his personal superintendence and direction.

Upon the same principle it would probably be held that if the contract provided that it was not to be assigned to a particular person, it could not be assigned to such person. And it would seem, from one of the cases cited by the appellant, that if an intention not to deal with a particular person appears from circumstances outside of the contract, it cannot be assigned to such person. In the case referred to, the plaintiff had previously been supplying the defendant with ice; but the latter had become dissatisfied, and had transferred his custom to a company called the Citizens' Ice Company, and had made a contract with it. After this the plaintiff bought out the Citizens' Ice Company, and without letting the defendant know of the transfer, went on supplying him with ice. When the defendant found out what had been done, he refused to pay for the ice, and the court held that he was not liable, although he had consumed the ice, and had no fault to find with it: *Boston Ice Co. v. Potter*, 123 Mass. 30; 25 Am. Rep. 9. We think that this case may be distinguished from the one before us, on the ground of the extraneous circumstances showing the defendant's intention not to deal with the plaintiff. If it cannot be so distinguished, we should be inclined to question the soundness of the decision.

In the next place, although the language may not show an intention that the contract should not be assigned, yet the nature of the case may be such that performance by another would be an essentially different thing from that contracted for. Thus a picture by one artist is an essentially different

thing from a picture on the same subject by another artist; and so of a book composed by an author, or any other act or thing where the skill, credit, or other personal quality or circumstance of the party is a distinctive characteristic of the thing contracted for, or a material inducement to the contract. Under this general head come several cases relied upon for the appellant. Thus in *Lansden v. McCarthy*, 45 Mo. 106, it was held that a contract to deliver meat to a hotel, to be paid for at the end of each month, could not be assigned by the hotel-keeper; the court saying: "The defendant's estimate of the solvency and pecuniary credit and standing of the plaintiff's assignor may have constituted an important inducement to the contract without which he never would have entered it." So in *Arkansas Smelting Co. v. Belden Co.*, 127 U. S. 388, it was held that a contract to sell ore to a smelting company, the price of which was to be adjusted and paid by the mutual acts of the parties after delivery, was not assignable by the smelting company; the court, per Gray, J., saying: "During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price, the defendant had no security for its payment, except in the character and solvency" of the smelting company.

If, therefore, the case before us comes within either of the qualifications above stated, then it must be conceded that the contract was not assignable. But if it does not,—that is to say, if the language does not exclude the idea of performance by another, and the nature of the thing contracted for, or the circumstances of the case, do not show that the skill, credit, or other personal quality or circumstance of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract,—then the contract was assignable, under the provisions above quoted. It is obvious, therefore, that, in this state at least, the question whether a contract is assignable is a question of construction. As was said in the Kentucky case above referred to, "the question . . . in every case must turn at last upon the intention of the parties." But upon a proper construction, there is nothing to show that the contract was not assignable.

(a) There is nothing in the language which excludes the idea of performance by another.

The mere fact that the name of the owner of the vineyard was used does not exclude the idea of such performance. The name of the contracting party is almost always inserted as a

convenient means of identification. Thus where John Smith signs a contract which stated that John Smith agrees to pay John Doe a sum of money in consideration of a conveyance of land which the latter agrees to make to the former upon such payment, there can be no doubt that the use of Smith's name does not indicate an intention that his assignee could not perform the contract. To say otherwise would be to say that hardly any contract is assignable unless the word "assigns," or equivalent language, is inserted, which would hardly be contended.

Nor is the use of personal pronouns of more significance. The counsel for the appellant lay stress upon the circumstance that Hopper agreed to deliver "all the grapes he may raise on the vines he now has growing on his place," etc. But it seems clear that these pronouns were used as equivalents of the proper name, and merely to save repetition of such name. They do not import a desire for the personal services or attention of the owner as contradistinguished from his assignee. This will be readily seen if the same words are applied to different subject-matter. Thus if it be agreed to buy from another at a fixed price a specific quantity of fire-wood, which he agrees to cut during a certain period from the timber he then has growing upon his farm, etc., it would surely not be argued that the mere language indicated that the wood was to be cut by the owner himself, or by his agents, and not by his assignee. And so of similar language in contracts to pay money, to convey land, and the like.

(b) There is nothing in the nature or circumstances of the case which shows that the skill or other personal quality of the party was a distinctive characteristic of the thing stipulated for, or a material inducement to the contract.

There is no evidence that grapes for wine-making, containing a specified amount of saccharine matter, raised upon a particular vineyard by one man, would necessarily or probably be different from grapes raised from the same vines by another man. Possibly there would be a difference between grapes from different vineyards, as the difference between the climate and soil of different places in close proximity is known to be considerable. But here not only is the vineyard the same, but the vines were the same; that is to say, the crop in question was from vines planted by the assignor.

It is not impossible that one man might have some peculiar skill or secret by which he could raise better grapes from the

same vines than other men could. But there is no evidence that there was any such peculiarity about the original owner of this vineyard, and we do not think that the court will assume that there was. And while it is to be conceded that men have perfect liberty to contract with whom they choose, and to exclude the idea of performance by another, yet in the absence of anything indicating such an intention, we do not think that the court should indulge in speculation as to possible prejudice or fancied preference. It should not assume that the parties were influenced by unusual or conjectural motives merely because some men might be so affected under similar circumstances. For example, some men of solvency and credit have preferences as to the persons from whom they borrow money, and would be displeased at having their paper passed around among usurers. Yet at the present day all the courts would hold that, in the absence of indication of a contrary intention, contracts for the payment of money are assignable. So in many cases owners of real property have some choice as to the persons they admit as tenants. Yet it is well settled that an ordinary lease is assignable by the tenant, in the absence of the manifestation of a contrary intention. And the case of a lease is not to be disposed of by saying that it is an interest in property. For by the express provision of the code, the right to the performance of an obligation is property: Civ. Code, sec. 1458.

These instances, and others which might be mentioned, show that it will not do to indulge in conjecture as to fanciful and unusual motives and prejudices. Now, in the case before us, as has been stated, there is no evidence of anything from which it can be inferred that performance was to be by the original owner of the vineyard, and not by another. Suppose that he had gone to live permanently in Europe, and had given no kind of attention or supervision to the place, would it have been contended that under such circumstances the defendant would have been justified in refusing to accept grapes of the required standard grown upon the vineyard by an agent? We imagine not. And in the case put, there would be no kind of supervision by the owner who would be entirely and permanently absent. And it seems purely fanciful to say that in such case he would exercise some skill in the selection of an agent, and that the parties must be supposed to have had this in view. Now, if in the case put the defendant would be liable, how can it be said that the circumstances

show that the personal qualities of the owner were a material inducement to the contract? We cannot see any reason that would make this contract non-assignable which would not equally apply to the ordinary crops or corn, wheat, oats, potatoes, etc. If in such cases a party prefers to deal with one person to the exclusion of assignees, it is very easy to indicate such preference in the contract. Courts will not assume that unusual motives exist.

The learned counsel for the appellant have advanced other considerations, which may be noticed briefly.

The fact that the contract provided, in substance, that if advances should be made by the wine-maker they should bear interest at a certain rate does not indicate that the solvency or credit of the owner of the vineyard was an inducement to the contract; for the making of such advances was entirely optional with the wine-maker.

Nor is there anything in the circumstance that the owner of the vineyard was not bound to raise grapes. What the contract secured to him was, the right to raise grapes of a specified standard, and to compel the defendant to take them at a fixed price. This may have been an unwise contract for the defendant to make. But an optional contract upon sufficient consideration is binding: *Hall v. Center*, 40 Cal. 63; and the mere fact that it is optional cannot be a reason why it should not be assigned.

We have not overlooked the distinction pointed out by counsel between executory contracts and contracts which have been executed on one side. What we have said applies where something remains to be done by the party who assigns.

And as a matter of course (since a party cannot release himself from an obligation by his own act without the consent of the other party), it is only the benefit of a contract which can be assigned. Where there is a burden, it cannot be transferred without the consent of the other party: Civ. Code, sec. 1457.

It may be added that we have examined the English case of *Robson v. Drummond*, 2 Barn. & Ald. 303, cited by counsel, but consider it to have been disapproved in the subsequent case of *British Wagon Co. v. Lea*, L. R. 5 Q. B. D. 149. It is true that the principle of the former case was approved in the latter. But it is only the application of the principle which makes the case in point here, and this is what was disapproved in the latter case, which did not turn upon the use of the word "executors," in the contract.

2. The jury included in their verdict the expenses of boxing and shipping the whole of the first and second crop of the year in question, while the recovery was restricted by the court to that portion of the grapes which contained twenty-two per cent of saccharine matter. We think that it was error to include in the verdict the expenses of boxing and shipping that portion of the grapes which did not come up to the required standard. The respondent contends, in this regard, that he ought to have recovered for all the grapes, regardless of the amount of saccharine matter they contained, and that the error was in favor of the appellant. But we do not take that view of the matter. The contract provides that the grapes were not to be gathered until they contained twenty-two per cent of saccharine matter, and as they could not be delivered at the wine-cellar until they were gathered, we think it is to be inferred that the defendant was not to receive them unless they came up to the standard mentioned. Any other construction would bind the defendant to pay the twenty-five dollars per ton for grapes which might not contain any saccharine matter at all.

But the judgment can be modified so as to avoid the consequences of this error. Giving the appellant the benefit of small fractions, the verdict was too large (for the reason mentioned) by \$337.57. The respondent, under the order of the court on motion for new trial, remitted \$119.70, leaving the verdict still too large by \$217.87.

We therefore advise that the judgment be modified, by deducting therefrom the sum of \$217.87, and that as modified the judgment and order denying a new trial be affirmed, the appellant to recover his costs of appeal.

VANCLIEF, C., and BELCHER, C. C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is modified, by deducting therefrom the sum of \$217.87, and that as modified the judgment and the order denying a new trial are affirmed, the appellant to recover his costs of appeal.

Hearing in Bank denied.

CONTRACTS — ASSIGNMENT. — The contract of sale of certain trees growing upon land, to be chosen by the vendee, passes an interest which may be assigned before the election is made: *McCoy v. Herbert*, 9 Leigh, 548; 23 Am. Dec. 256.

CLEARY v. FOLGER.

[81 CALIFORNIA, 316.]

TIME IS OF THE ESSENCE OF A CONTRACT FOR THE SALE AND PURCHASE OF REAL ESTATE, when it declares that "in the event of the failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law or in equity to convey such property, and the party of the second part shall forfeit all right thereto."

FORFEITURES ARE NOT FAVORED IN COURTS OF EQUITY, and are never enforced if couched in ambiguous language.

FORFEITURE OF MONEY PAID ON A CONTRACT FOR THE SALE and purchase of real property cannot be enforced where both parties have failed to comply with the contract, as where the vendee has failed to pay the balance of the purchase-money within the time stipulated by the contract, and the vendor has, on his part, neglected to tender a conveyance, and to demand such payment.

CONTRACT, TERMINATION OF — RECOVERY OF MONEYS PAID ON. — If time is of the essence of a contract, and each of the parties neglects within the time designated to tender performance thereof, the contract terminates, and any moneys which have been paid thereon may be recovered of the party to whom they were paid.

PLEADING — RECoupMENT OF DAMAGES. — If a vendor, sued to recover moneys paid him under a contract to purchase real estate, desires to recoup any damages done him by the plaintiff's failure to comply with such contract, he must specially plead such damages.

JUDGMENT — ESTOPPEL BY. — Judgment upon a cross-complaint determining that the defendant is not entitled to a specific performance of a contract to purchase real estate of him for the reason that such contract had been terminated by the failure of both parties to offer compliance therewith within the time designated therein does not estop the plaintiff from maintaining an action to recover moneys paid by him upon such contract.

B. McFadden, for the appellant.

R. M. Fitzgerald, for the respondent.

FOOTE, C. This was an action to recover the sum of nine hundred dollars, alleged to have been received by the defendant for the plaintiff's use. The court below, upon the evidence offered by the plaintiff, granted the motion of nonsuit made by the defendant. From the judgment thereupon rendered, and an order denying a new trial, this appeal is taken.

The facts of the case are, that the two parties to the action entered into a contract, which is as follows: —

"This agreement, made and entered into this twenty-second day of August, in the year of our Lord one thousand eight

hundred and eighty-seven, between J. A. Folger, the party of the first part, and Michael Cleary, the party of the second part, witnesseth, that the said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all the certain lot or parcel of land situate in Brooklyn township, county of Alameda, and state of California, and bounded and particularly described as follows, to wit: A tract of land containing seven and one quarter ($7\frac{1}{4}$) acres, more or less, on the southeasterly side of the county road, the said road being the first road running north from Hopkins Street after leaving Fruitvale Avenue, going toward the east, now known as the Thorne property, adjoining the lands of Mr. Welsh and Mr. Rhoda, for the sum of \$9,425, gold coin of the United States; and the said party of the second part, in consideration of the premises, agrees to pay, at the times and in the manner hereinafter mentioned, to the said party of the first part, the sum of \$9,425, gold coin, as follows, to wit: \$900 in gold coin as forfeit; \$4,100 in gold coin on or before September 6, 1887; the balance due of purchase, namely, \$4,425, on mortgage at eight per cent per annum.

"And the said party of the second part agrees to pay all state and county taxes or assessments, of whatsoever nature, which may become due on the premises above described.

"In the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto. And the said party of the first part, on receiving such payment, at the time and in the manner above mentioned, agrees to execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed conveying said land free and clear of all encumbrances made, done, or suffered by the said party of the first part.

"And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties, and that time is of the essence of this contract.

"In witness whereof, the said parties to these presents have

hereunto set their hands and seals the day and year first above written.

[SEAL.]

'J. A. FOLGER, JR.

[SEAL.]

"MICHAEL CLEARY.

"Signed, sealed, and delivered in the presence of

"W. K. MOCKBEE."

Indorsed: "Filed December 8, 1887.

"CHARLES T. BOARDMAN, County Clerk.

"By ROBERT EDGAR, Deputy Clerk."

On the 12th of September, 1887, the plaintiff notified the defendant in writing that he rescinded the contract, and he demanded back the nine hundred dollars, which, under the terms of the contract, had been paid over and designated as "a forfeit."

Up to that time neither the plaintiff had tendered the payment of the balance of the purchase-money, nor the defendant a deed, etc., to the premises.

Upon this, the defendant failing to pay back the deposit, the plaintiff institutes this action. The defendant answered and filed a cross-complaint, the object of which last was to force the plaintiff to comply specifically with the contract, and pay the balance of the purchase-money upon the defendant's making a good and sufficient conveyance of title, etc., to the premises.

The court below seems to have decided against the defendant on his cross-complaint, evidently upon the theory that he could not enforce a mutual and dependent covenant of the plaintiff without having on his, the defendant's, part, tendered a deed at the date fixed in the contract, and demanded payment of the installment due, but does not seem to have determined anything with reference to the right of the plaintiff to recover back the nine hundred dollars sued for.

Neither the balance of the purchase-money was tendered on the sixth day of September, 1887, by the plaintiff, or a deed by the defendant, or demand made of payment of the installment due. So far, then, as the further carrying out of the agreement was concerned, time being of the essence of the contract, each side had neglected to perform its part of the agreement necessary to consummate the contract, and it was at an end. The plaintiff could not be forced to pay the balance of the purchase-money, as no deed had been tendered him or installment due demanded: *Bohall v. Diller*, 41 Cal. 535. The

defendant was no longer obliged to make a deed to the promises conveying a good and sufficient title, as the balance of the purchase-money was not tendered: *Englander v. Rogers*, 41 Cal. 421; so that the material question is left to be determined, whether or not the plaintiff, upon this state of facts, is entitled to recover from the defendant, as money in his hands held for plaintiff's use, the nine hundred dollars which he deposited with the defendant on the inception of the contract as "a forfeit."

Time was undoubtedly of the essence of the contract, under the rule laid down in *Grey v. Tubbs*, 43 Cal. 364, in construing such a contract as the one in hand. In that case this covenant was contained in the contract: "In the event of failure to comply with the terms hereof by the party of the second part [the purchaser], the party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto."

In the present case the language is: "In the event of a failure to comply with the terms hereof by the said party of the second part [the purchaser], the said party of the first part shall be released from all obligations, in law or equity, to convey said property, and said party of the second part shall forfeit all right thereto."

In *Grey v. Tubbs*, 43 Cal. 364, it was said of the language above quoted from the contract construed in that case: "It would be difficult to express with greater clearness and certainty than the parties did in this contract that time is of the essence of the contract, except it were done by the insertion of those very words in the instrument. Courts of equity have not the power to make contracts for parties, nor to alter those which the parties have deliberately made; and whenever it appears that the parties have in fact contracted that if the purchaser make default in the payments as agreed upon, he shall not be entitled to a conveyance, and shall lose the benefit of his purchase; and when it also appears that the purchaser is without excuse for his delay, the courts will not relieve him from the consequences of his default."

Forfeitures, as such, are not favored by the courts, and are never enforced if they are couched in ambiguous terms. It is not perfectly certain what the intentions of the parties to this contract were with reference to the nine hundred dollars paid as a forfeit, but construing it with reference to the second

clause of the agreement, which we have quoted, and compared with that contained in *Grey v. Tubbs*, 43 Cal. 364, it appears as if it was intended to be in the nature of liquidated damages, if the purchaser should fail, after the contemporaneous tender of a deed to him of the land, and demand of payment of the installment due, etc., to comply with his part of the agreement.

Now, as both parties have failed to comply with their part of the agreement, and, as we have seen, time being of the essence of the contract, the contract is at an end, the nine hundred dollars remain in the hands of the defendant as money had and received from the plaintiff, subject to be recovered by the plaintiff, less the amount of damages which the defendant may show for the failure of the plaintiff to complete the purchase.

The agreements of the parties were reciprocal, and to be performed, or offered to be performed, contemporaneously at a certain stated time. Both have failed to offer to perform; and if any damage has been done by the plaintiff, the defendant may recoup for it in an action brought to recover the nine hundred dollars, which reverts to the plaintiff as money held by the defendant for his use. The pleadings as they now stand do not admit of this determination, but the defendant, on a retrial, may reform his pleading so as to raise that issue.

We perceive no error in the ruling of the court upon the introduction of the judgment roll in the matter of the cross-complaint. It did not tend to show any determination of the question as to what was to become of the nine hundred dollars, designated as "a forfeit."

The other points raised it is unnecessary to notice, but, for the reasons above given, we advise that the judgment and order be reversed, with leave to the defendant, within a reasonable time, to frame his pleading as heretofore indicated.

GIBSON, C., and VANCLIFF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed, with leave to the defendant, within a reasonable time, to frame his pleading as indicated therein.

CONTRACT—TIME AS OF THE ESSENCE.—As to what stipulations show that time is made of the essence of the contract, see extended note to *Jones v. Robbins*, 50 Am. Dec. 597-600. The question as to whether and when time is of the essence of the contract to convey land is discussed in *Green v. Coville*, 10 Cal. 317, 70 Am. Dec. 725, where the California doctrine is stated

CONTRACTS FOR THE SALE OF REALTY — FORFEITURE. — Forfeitures are not favored, and courts are reluctant to enforce them: *Sanford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748; note to *Smith v. Mariner*, 68 Am. Dec. 67.

CONTRACTS FOR THE SALE OF REALTY — RECOUPMENT. — For the law applicable to recoupment in contracts for the sale of land, see note to *Van Epps v. Harrison*, 40 Am. Dec. 334, 335.

[IN BANK.]

HAVEMEYER v. SUPERIOR COURT.

[84 CALIFORNIA, 327.]

RECEIVER OF A CORPORATION WHICH HAS FORFEITED ITS CORPORATE RIGHTS. — Notwithstanding the provision of the code of California declaring that a receiver may be appointed "in cases where a corporation has been dissolved, or is insolvent, or in danger of insolvency, or has forfeited its rights," a court which enters judgment of forfeiture against a corporation at a suit of the state for abuses of its franchises has no authority to appoint a receiver of the corporate assets, unless at the instance of some person interested as a creditor or stockholder, and upon a showing that such appointment is necessary for the protection of its rights.

WHEN A CORPORATION CEASES TO EXIST, no matter from what cause, its property is left to be disposed of according to law. It neither reverts to its grantors nor escheats to the state, but belongs, after the payment of the corporate debts, to those who were stockholders at the date of its dissolution.

CORPORATIONS, MANAGERS OF DISSOLVED. — Under the code of California, the directors of a corporation at the time of its dissolution are trustees of the creditors and stockholders, and have full power to settle its affairs, unless other persons are appointed by the court; and after a judgment of forfeiture is entered against a corporation, its directors are entitled to act as such trustees, and to settle its affairs. They may be called to account in a court of equity by an appropriate action or proceeding by any party in interest, but until so called to account, no court has any power to appoint a receiver to take possession of the corporate property, or to otherwise exercise the functions of such directors.

CONSTRUCTION OF STATUTE. — Before a clause of a code or statute should be construed contrary to its obvious meaning, it must certainly appear that such construction is necessary to prevent a conflict with some other provision of controlling force, or some legal principle of general application.

CONSTRUCTION OF RULE OF COURT. — The rule of the supreme court of California applicable to proceedings for writs of prohibition and the like writs requiring, when a judge or public officer is named as respondent, that the petition shall state the names of the real parties in interest, and that a copy of the petition and writ shall be served upon such parties, does not require that they be made formal parties to the proceedings by being named as defendants, but only that their names shall be disclosed by the petition. A failure to serve them with a copy of the petition and writ does not abate the whole proceeding, but, at most, requires its postponement until they can be served and have a reasonable time to appear.

CORPORATION, PUNISHMENT OF, FOR VIOLATING CHARTER. — When a corporate franchise is unlawfully held or exercised, the attorney-general may, under the laws of California, bring an action for its forfeiture; but the only judgment which can be entered in such action is, that the defendant be excluded from the franchise it has abused, and that it pay a fine not exceeding five thousand dollars. No other punishment can be imposed. Hence a court cannot in such action appoint a receiver and take the corporate assets and the management of its affairs out of the hands of the directors, to whom they are by law confided, where no creditor, stockholder, or member of the corporation asks for such receivership.

WANT OF PENAL LEGISLATION WILL NOT BE SUPPLIED BY THE COURTS. — If the legislature has not provided adequate punishment for the violation of a corporate charter and the abuse of the corporate franchises, the court will not impose any further punishment than that provided.

CORPORATE CONTRACTS IN RESTRAINT OF TRADE. — **FOR THE MAKING OF CONTRACTS IN RESTRAINT OF TRADE, THE ONLY PENALTY** is, that the courts refuse to enforce them. Such a contract, when made by a corporation, even though it justifies the forfeiture of its charter, does not authorize a court to appoint a receiver of the corporation, nor to take the management of its affairs out of the hands of the directors, who, upon its dissolution, become, under the statute of California, trustees of such assets for the benefit of creditors and stockholders.

CORPORATIONS. — **UPON THE FORFEITURE OF THE CHARTER OF A CORPORATION** for abuses of its franchise, its property is not forfeited to the state, but is held by its directors in trust for its creditors, and for the payment of its debts.

RECEIVER OF CORPORATION, VOID APPOINTMENT OF. — **ORDER APPOINTING A RECEIVER OF A CORPORATION AT THE INSTANCE OF THE STATE,** and after a judgment of forfeiture has been entered against such corporation, and in the absence of any application for such appointment on behalf of any of its creditors or stockholders, is void.

APPEAL — STAY OF PROCEEDINGS — APPOINTMENT OF RECEIVER AFTER. — When a judgment has been entered against a corporation forfeiting its charter and franchises, and an appeal has been taken therefrom, and a bond given sufficient to stay the execution of judgment, a further order entered in the action, appointing a receiver for the purpose of carrying the judgment into effect, is void.

AN APPEAL FROM JUDGMENT FORFEITING THE CHARTER AND FRANCHISE OF A CORPORATION, supported by a sufficient bond, stays all further proceedings under such judgment.

IN PENDENS. — **PURCHASERS OF THE PROPERTY OF A CORPORATION DURING THE PENDENCY** of an action for the forfeiture of its charter are not bound by an order entered in such action appointing a receiver and directing him to take possession of such property. The state does not by such an action acquire any lien upon the property of the corporation, nor any right to prevent it from disposing of its property in good faith.

PURCHASERS FROM A CORPORATION ARE NOT PRECLUDED FROM DENYING THE VALIDITY of an order appointing a receiver and directing him to take possession of such property by the fact that in the capacity of stockholders of the corporation they appeared in the action and resisted such appointment.

RECEIVER HAS NO RIGHT TO TAKE PROPERTY FROM THE POSSESSION OF A STRANGER TO THE ACTION; and an order directing him to take possession of specific property does not justify him in taking it from one claiming title paramount to that of the parties to the action.

WRIT OF PROHIBITION MAY ISSUE AFTER A RECEIVER HAS BEEN APPOINTED, if the court had no authority to make such appointment. The writ operates upon the court, and thereby affects its receiver, who is its officer.

WRIT OF PROHIBITION STAYS ALL PROCEEDINGS OF THE COURT WHICH ARE NOT COMPLETED AND ENDED; and if necessary to afford complete and adequate relief, what has been done will be undone.

WRIT OF PROHIBITION, WHERE ANYTHING REMAINS TO BE DONE BY THE COURT, not only prevents what remains to be done, but gives complete relief by undoing what has been done. Hence if a receiver has got possession of property under a void judgment or order, and a writ of prohibition afterwards issues to the court, the effect of the writ is to require the receiver to restore such possession to the party from whom it was taken. Otherwise the prohibition would be worse than no remedy at all.

WRIT OF PROHIBITION CANNOT BE DENIED MERELY BECAUSE THE APPLICANT might have moved the court to set aside the invalid order or judgment.

WRIT OF PROHIBITION MAY ISSUE THOUGH THERE IS A REMEDY BY APPEAL, if that remedy is not adequate, as where a court, without authority to do so, appointed a receiver and directed him to take possession of property, and then determined that no appeal could operate to stay proceedings or to divest the receiver of the right to take possession of such property.

THOUGH THE WRIT OF PROHIBITION DOES NOT ISSUE TO TRY TITLE TO PROPERTY, YET if a court by its order takes property out of the possession of a stranger to the proceedings, who claims it as his own, the order is in excess of its jurisdiction, irrespective of the actual state of the title, and the writ of prohibition will issue to annul such order.

WRIT OF PROHIBITION IS NOT TO BE REFUSED WHEN DEMANDED BY A real party in interest bringing himself clearly within the law. The court has no right to refuse the writ on the ground that such party is a bad man, and deserves the punishment he is threatened with, nor upon any other consideration which appeals to the mere discretion of the court or judge.

WRIT OF PROHIBITION.—The jurisdiction of the court to grant a peremptory writ of prohibition may be exercised, though it does not appear, either by averment or proof, that the applicant therefor, before filing his petition for the writ, had pleaded to the jurisdiction of the subordinate court, and that his plea had been overruled. The rule of practice adopted by the supreme court of California is, that this writ will not be issued until the objection to its want or excess of jurisdiction has, in some form, been made in and overruled by the lower court.

Wilson and Wilson, and Garber, Boalt, and Bishop, for the petitioners.

William M. Pierson, for the superior court, respondent.

Sullivan and Sullivan, and W. H. Metson, for P. Reddy, receiver, respondent.

BEATTY, C. J. This is an original application for a writ of prohibition to the superior court of the city and county of San Francisco, department No. 6, William T. Wallace, judge, commanding and directing said court and judge, and the receiver of said court, Patrick Reddy, Esq., to desist and refrain from proceeding or acting upon or in pursuance of a certain order appointing said receiver.

The importance of the case, not only as regards the interests at stake, but also in respect to the questions of law and practice which it involves, will justify, if it does not require, a somewhat detailed statement of the facts out of which it arises.

It appears that in the month of November, 1888, the people of the state of California, on the relation of the attorney-general, commenced an action in said superior court against the American Sugar Refinery Company, a California corporation, for the purpose of forfeiting its charter. The corporation appeared and answered the complaint, and after trial the judgment of said superior court was pronounced, declaring the forfeiture and imposing upon the corporation defendant a fine of five thousand dollars and costs of suit.

The judgment was rendered January 8, 1890, and on the same day, at the instance of the attorneys representing the state, a rule was issued and served requiring said corporation and its attorneys to show cause on the 10th of January why a receiver should not be appointed "to take charge of the estate and effects of the said defendant corporation, and to distribute the same according to law, or to preserve the same pending an appeal herein, if such appeal be taken herein, on the ground that said defendant corporation has been dissolved and has forfeited its corporate rights."

On the return day of the rule, the corporation appeared, and the hearing was continued until January 20th.

Meantime — on January 18th — the corporation duly served and filed its notice of appeal to this court from the judgment against it, and at the same time filed in due form a bond in the penal sum of twelve thousand dollars to stay proceedings on said judgment.

After hearing the motion for a receiver, the judge of the superior court held the matter under advisement until February 17th, on which day he made an order as follows (after reciting the previous proceedings): —

"It is ordered that Patrick Reddy, a resident of the city and county of San Francisco, state of California, be, and he hereby

is, appointed receiver of the property and effects of the defendant, wherever the same may be situate, including the American Sugar Refinery, situate at the southwest corner of Union and Battery streets, in this city and county, and its appurtenances.

"It is further ordered that the defendant, its officers, agents, attorneys, servants, and employees, and all persons and corporations, associations, or firms holding any of the defendant's property in trust for said defendant or its stockholders, do immediately, upon the production of this order, surrender into the possession of said receiver all the said property, real, personal, and mixed, wherever situate, belonging to said defendant, including all its books, records, and papers.

"And it is further ordered that said receiver do immediately take into his exclusive possession all the books, records, and papers of said defendant, and all the said property, real, personal, and mixed, of the said defendant, including the said American Sugar Refinery, so as aforesaid situate in said city and county, and hold the same pending the appeal from the judgment herein, and the final determination of the motion for new trial, and until the further order of this court; and that said receiver at once close the said refinery, and do not dispose of any of the said property of the said defendant until the further order of this court.

"It is further ordered, and I hereby direct, that the said receiver execute to the state of California an undertaking, with two sufficient sureties, to be approved by me, in the sum of ten thousand dollars, to the effect that he will faithfully discharge the duties of receiver in the above-entitled action.

"Dated February 17, 1890.

"WILLIAM T. WALLACE, Judge."

On the same day a second order was made, which, after reciting the one above quoted, and the fact that the receiver had executed and filed a sufficient undertaking as therein required, and had taken the oath and office, concludes as follows:—

"Now, therefore, it is hereby ordered that said receiver be, and he is hereby, invested with all the power and authority mentioned and conferred in said order hereinabove recited, to the same extent as if the same were again here repeated and recited at length.

"Dated February 17, 1890.

"WILLIAM T. WALLACE, Judge."

Immediately upon the issuance of this order, Mr. Reddy proceeded to the sugar refinery therein mentioned, which he found in full operation under the direction and control of a superintendent, foreman, and others in the pay and employment of the petitioners herein, who claim to have purchased the property and to have received a conveyance thereof from the American Sugar Refinery Company in the month of March, 1889, since which time they assert that they have been in full and complete possession as absolute owners in their own exclusive right.

Mr. Reddy, however, demanded of those in charge that they should immediately transfer the possession of the premises and everything connected with and contained in the refinery to him, as receiver, and he claims that on the evening of the 17th he had succeeded in obtaining full and absolute possession and control of the entire establishment. This claim is disputed by the petitioners, and whether it is true or not is one of the principal questions in the case. The facts upon which its solution depends will be reviewed when the question is reached. Meantime, and for the purposes of this preliminary statement, it is sufficient to say that the petitioners and the receiver each claim to have had possession of the refinery on the 17th of February and on the following day. The receiver claims that his possession was complete and absolute from and after the evening of the 17th. The petitioners contended that, at most, there was a mere scramble for possession by the receiver up to the time when he was served with notice of the alternative writ of prohibition herein on the afternoon of February 18th.

The first notice that the petitioners, or their employees, had of the order appointing the receiver, and directing him to take possession of the sugar refinery, was Mr. Reddy's demand for possession and proclamation of his authority. The agents in charge of the refinery, before yielding to his demands, asked to be allowed an opportunity of obtaining legal advice as to their rights and duties in the matter. This was conceded by Mr. Reddy, upon the understanding that the superintendent of the refinery would notify him at ten o'clock next morning what course he had decided to take. Availing themselves of this respite, the agents of petitioners consulted counsel, and during the night of February 17th, affidavits were prepared upon which to base an application to Judge Wallace for a suspension or modification of his order. Prior to ten o'clock

on the following morning, Mr. Reddy was notified of this intended application, and at about the hour of ten o'clock he and his counsel, and counsel for petitioners, met Judge Wallace at his chambers, where, at least, an informal application was made to the judge for a stay of proceedings pending a motion to set aside or modify his previous order directing the receiver to take possession of and close the refinery. What occurred at this interview is one of the principal points of controversy in the case, as involving a question of practice or procedure. The facts will be stated, so far as necessary, when we come to consider that question.

For the present it is sufficient to say that Judge Wallace refused to grant any stay of proceedings for even an hour, unless the petitioners would at once desist from all opposition to the receiver, and yield instant and absolute possession of the refinery and other property. This condition was not assented to, and it was then agreed between Mr. Reddy and his counsel, upon one side, and counsel for petitioners on the other, that at the hour of twelve o'clock on that day counsel for Mr. Reddy should be informed what further steps the petitioners had decided to take, and whether they would further oppose his claims, as receiver, to the possession of the refinery.

At twelve o'clock, counsel for Mr. Reddy was notified in substance that his right to the possession could not be admitted, and that his taking possession would be opposed so far as it could be done without a resort to actual force or violence. Meantime, Mr. Reddy had again attempted to assert and enforce his possession and authority at the refinery, and had met with such resistance that he felt it necessary to resort to the court for its aid. He therefore made and filed an affidavit entitled in the action against the American Sugar Refinery Company, in which, after reciting the various proceedings and orders therein, including his appointment and qualification as receiver, he proceeded as follows:—

“That deponent, as such receiver, entered into possession of the American Sugar Refinery, and the property therein situate, in the city and county of San Francisco; that H. C. Mott and R. H. Sprague impede, hinder, and delay this deponent in the discharge of his duties as such receiver, and refuse to allow deponent to take into his possession and control certain property situate on the premises aforesaid; that said parties last above named, notwithstanding the receiver's possession of

said premises, dispute his right to said possession, and resist the full enforcement of the order and judgment of this court, and especially of the order hereinabove set forth. Wherefore this deponent prays this honorable court to give its order and direction to the sheriff of said city and county of San Francisco to enforce the orders and direction of this court as duly given and made in and by the order hereinabove set forth, and to do and perform all acts which may be necessary to place said receiver in complete possession of said American Sugar Refinery, and all and singular the property therein situated, and the property of said defendant of whatever character and wherever situated."

Immediately upon the filing of this affidavit of the receiver, and at about the hour of 1:30, P. M., of February 18th, Judge Wallace made and filed an order which, after reciting the previous proceedings, concludes as follows:—

"Now, you, the said sheriff, are hereby required to execute and enforce each and every, all and singular, the matters in said order appointing a receiver contained, in so far as may be necessary to place said receiver in possession, and to do and perform all acts which may be necessary to place Patrick Reddy, said receiver, in exclusive, full, and complete possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery streets, in said city and county of San Francisco, and of all and singular the property, real and personal, of said American Sugar Refinery Company, in said city and county of San Francisco. And you, said sheriff, are directed to make return of said order appointing a receiver, and of this order, within ten days after your receipt hereof, with what you have done indorsed thereon. WILLIAM T. WALLACE, Judge."

This order, which the superior judge and sheriff denominate a writ, was afterward, on February 28, 1890, filed by the sheriff, with the following return indorsed thereon:—

"I, C. S. Laumeister, sheriff of the city and county of San Francisco, state of California, certify that the annexed and accompanying orders and writs, issued out of the superior court of the city and county of San Francisco, were placed in my hands at 1:45, P. M., on Tuesday, February 18, 1890. In obedience to the said orders and writ, I proceeded to the premises designated therein, and found Patrick Reddy, who had theretofore been appointed by said honorable court as

receiver in said action, in possession of said premises, in said orders and writ mentioned and described; that I found upon said premises certain persons who, I was informed, were interfering with the possession and enjoyment of said premises by said receiver; that I thereupon exhibited said order, and requested said persons to retire from said premises, and that said persons thereupon retired from said premises described in said writ and order, and thereupon left said Patrick Reddy in the peaceful and undisturbed and undisputed possession of the land and premises known as the American Sugar Refinery, situated at the southwest corner of Union and Battery streets, in said city and county, with the appurtenances thereto belonging, and the fixtures therein, and all property, real and personal, appertaining thereto; that I also found said receiver in possession of the office of the American Sugar Refinery Company at No. 220 California Street, and I left him in possession thereof; that I also found said receiver in possession of an office and premises situated in the second story of a building, No. 124 California Street, which said office and premises were designated with the name the American Sugar Refinery Company, and I left said receiver in absolute possession of said premises last-above described, and all of the premises and property hereinabove mentioned and described; that all of said actions and proceedings done, had, and performed by me, under and in obedience to said orders and writ, were done, had, and performed, and completed at and before the hour of three o'clock, P. M., of said eighteenth day of February, 1890."

While these proceedings by and on behalf of the receiver were in progress, the petitioners were applying here for a writ of prohibition, and about the hour of two o'clock, P. M., February 18th, an order for the issuance of an alternative writ was made and filed.

The writ issued in pursuance of our order was served on the receiver about 3:30 o'clock, P. M., and upon Judge Wallace about six o'clock, P. M.

In their petition for the writ, the petitioners set out the whole proceedings in the case of the *People v. American Sugar Refinery Co.* down to and including the order appointing the receiver, and the order supplementary thereto. They allege that ever since the twenty-first day of March, 1889, they have been the owners in fee-simple in their own right of the several tracts and parcels of land in San Francisco, which they spe-

cifically describe, and upon which are situate the sugar refinery and the various shops and offices appertaining; that ever since said date they have been carrying on in said buildings the business of refining sugars for sale in the markets of California and elsewhere; that they, also, have offices, furniture, books, and other personal property used by them in and about said business; that they do not use, hold, or possess said property, or any part thereof, in trust for the use or benefit of the American Sugar Refining Company, the defendant in the action referred to, or any of its directors, trustees, creditors, or stockholders, but solely for themselves, and for their own exclusive use and benefit, and have ever since said thirty-first day of March, 1889, been in the quiet and peaceable possession of the same, claiming title thereto and the exclusive ownership thereof; that since September, 1889, Henry C. Mott has been the general agent and attorney in fact of the petitioners, in actual charge and custody of all of said property, and duly authorized to conduct said business.

They then allege the demands of Reddy to be let into the possession of said property, their refusal and resistance, the damage that would result from a stoppage of the works, and that Reddy is threatening to cause the arrest of said agent and the superintendent of the works for contempt of the superior court in resisting the said order.

They further allege that they have, through their said agent, Henry C. Mott, respectfully presented the foregoing facts to said superior court, and called its attention to the excess of jurisdiction by it committed in making said order, and in directing said receiver to enter upon and take possession and control of their said property; and that they have requested said court to modify its said order so as to direct him to bring a proper action for the recovery of said property instead of taking possession without action, which request they say said superior court has denied.

They further allege that said orders, so far as they authorize the receiver to take the property in their possession and claimed by them, are beyond the power and jurisdiction of the court and in violation of their rights; that they are not parties to said action of the people against said American Sugar Refinery Company, nor did they make any appearance or participate in any respect in said action.

They further allege that, after said judgment against the Sugar Refinery Company, said company, on the 18th of

January, 1890, had taken and perfected an appeal therefrom to this court, and had filed an undertaking sufficient to stay the execution thereof.

And averring that they have no plain, speedy, or adequate remedy against said proceedings of the superior court in ordinary course of law, they pray "that a writ of prohibition herein may be issued to said superior court of the city and county of San Francisco, department No. 6, and the judge thereof, commanding and directing said court, and said judge, and also its said receiver, Patrick Reddy, to desist and refrain from further proceedings upon the order aforesaid appointing its said receiver, and from exercising any of the powers in said order granted with regard to any property in the possession of said Havemeyers and Elder through their agents or employees, and especially said sugar refinery, and from interfering with or disturbing the possession and control of the said Havemeyers and Elder of the said sugar refinery, or any other property by them possessed and claimed in their own right."

The order made by us upon the filing of this petition directed the issuance of an alternative writ of prohibition to department No. 6 of the superior court of the city and county of San Francisco, and to Hon. W. T. Wallace, judge of said court, in accordance with the prayer of the petition, "commanding said court and judge, either through said Patrick Reddy, receiver, or otherwise, from taking possession of or interfering with the possession or control by said Havemeyers and Elder, through their agents, or otherwise, of any property, real or personal, in their possession, and claimed by them in their own right, and especially of the said property situate on the southwest corner of Union and Battery streets, in said city and county, and the refinery situate thereon, or from interfering with the agents and employees of said Havemeyers and Elder in the conduct of the business of the same, or from exercising any of the powers granted to said receiver in the order appointing him, so far as enforcing the same is concerned against said Havemeyers and Elder."

Said order further directed said court and judge to show cause on March 3d why said prohibition should not be made absolute and perpetual, and that in the mean time, until further ordered, "all proceedings in said action upon the said order so appointing said receiver be stayed, so far as the said Havemeyers and Elder, and the property, real and per-

sonal, in their possession at the time said order was made appointing said receiver, are concerned."

The writ issued in pursuance of this order, in the name of the people and under the seal of the court, was, in substance, a repetition of the order, with some amplification of its terms, and not only the writ, but copies of the order and petition upon which it was founded, were served at the hours above mentioned on Judge Wallace and Mr. Reddy.

On February 25th, which was prior to the day upon which the respondent was required to show cause against the prohibition, affidavits were filed on behalf of the petitioners, alleging that the respondent and the receiver had committed a contempt of this court in proceeding under said order appointing the receiver contrary to the injunction contained in our order for the writ of prohibition; whereupon we made and directed to be served upon Judge Wallace and Mr. Reddy another order, in which, after reciting the substance of the charge contained in said affidavits, we commanded them to show cause, on March 3d, why they should not be adjudged guilty of contempt, and why the receiver should not be compelled to withdraw and retire from the sugar refinery, and make restitution of the personal property which he had taken into his possession.

On March 3, 1890, Judge Wallace and Mr. Reddy appeared and answered in both proceedings,—the prohibition and the contempt,—and they were heard, argued, and submitted together.

It is not necessary in this connection to set forth in detail the matters contained in the answers of the respondent and the receiver. It is sufficient to say that the answer of Judge Wallace contains denials and averments, upon which he claims that his power and jurisdiction to appoint a receiver of the property of the American Sugar Refinery is complete, and also that he had the like power and jurisdiction in the action against the corporation to command and authorize the receiver to take the specific property described in his order, notwithstanding it was in possession of the petitioners, under claim of exclusive ownership.

As to the matter of contempt, Judge Wallace takes the position that the effect of our order for and writ of prohibition was simply to tie his hands and shut his mouth, so that he could not, without a violation of its terms, give any order or direction to the receiver whatsoever, or in any manner inter-

fere with his proceedings; and he shows that he strictly adhered to this role of inaction. Mr. Reddy says that he and his counsel construed our order and writ in the same way, so far as it affected Judge Wallace, and therefore that he refrained from seeking any advice or direction from the superior court as to his own duties in the premises, relying in that matter wholly upon the advice of counsel, which he followed in good faith.

He says that he was advised — and that such was his own opinion — that the effect of the writ and order upon him was to confine him to the exact position in which they found him at the moment they were served. He contends that when the writ and order were served on him, he was in complete and absolute possession, to the exclusion of petitioners, of the sugar refinery, offices, shops, machinery and supplies, books, papers etc., engaged in working up about fifty thousand dollars' worth of sugar then in solution, preparatory to shutting down the works, and that he did nothing except to retain the possession which he had, and to shut down the works as soon as possible.

From this general statement of the case, the nature of the questions to be decided is sufficiently shown.

We have nothing whatever to do with any question as to the validity, correctness, or propriety of the judgment of fine and forfeiture pronounced against the American Sugar Refinery Company in the action instituted by the attorney-general in behalf of the people of the state. For all the purposes of this case that judgment is assumed to be absolutely just and valid, though suspended by the appeal.

But conceding the perfect validity of that judgment, the question remains, whether the superior court had any jurisdiction to make the order appointing the receiver and directing him to take specific property from the possession of the petitioners, who were not parties to the action, and were claiming said property in their own right.

Subordinate to this main question are a variety of others, which have been elaborately discussed by counsel; as, for instance, whether prohibition is the proper remedy when the court has exceeded its jurisdiction in appointing a receiver; whether, conceding it to be the proper remedy in such case, the petitioners have complied with the necessary conditions of its issuance; whether the court should not, in the exercise of its discretion, refuse its aid to these petitioners, even if they

have proceeded correctly in the matter of practice, and this not only because they have other plain, speedy, and adequate remedies, in the ordinary course of law, but principally because they are *particeps criminis* with the corporation in the misconduct for which its charter has been forfeited.

There are still other questions involved in the matter of the prohibition, and then there are the questions arising in the proceeding for contempt.

We shall proceed to discuss such of these points as we deem material, in about the order in which they have been stated.

And first as to the power of the superior court to make the order complained of.

The appointment of receivers and their powers and duties are regulated by sections 564 et seq. of the Code of Civil Procedure. It is therein provided that a receiver may be appointed by the court in which an action is pending, or by the judge thereof, in various cases, and among others:—

“5. In the cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.”

It is not necessary to refer to other grounds for the exercise of the power of appointment, because it is distinctly admitted by respondent and his counsel that the order here in question finds its sole support in the clause just quoted. The learned judge of the superior court, respondent here, in ruling upon the motion for a receiver, prepared and filed a written opinion, to which we have been referred as containing the essence of the argument on his behalf respecting the question under consideration, and we know of no better way to state the position for which he contends than to quote the opinion in full. It is as follows:—

“It was lately decided here that the corporation defendant had grossly abused its corporate franchise, — united itself with the Sugar Refinery Company in maintaining a monopoly of the article of refined sugar, destroying competition in its production, deteriorating its quality, and arbitrarily increasing its cost to consumers. Judgment of forfeiture of its corporate charter and the imposition of a fine of five thousand dollars followed.

“The attorney-general now applies for the appointment of a receiver of the corporate estate and effects.

“1. It is to be observed, *in limine*, that the application for a

receiver in a case of this impression is not to be dealt with as one made to a court of equity in the exercise of its preventive jurisdiction.

"The proceeding is for a forfeiture. That circumstance would of itself be fatal to an application made to a court of equity for a receiver; for equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.

"As observed by Chancellor Kent in *Livingston v. Tompkins*, 4 Johns. Ch. 431, 8 Am. Dec. 598: 'It may be laid down as a fundamental doctrine of the court that equity does not assist the recovery of a penalty or forfeiture, or anything of the nature of a forfeiture.'

"The proceeding is now, as in its inception, distinctively at law, and, as observed by the learned council for the defendant, 'without a single incident of a court of equity connected with it'; the information in the nature *quo warranto* with which it began, the judgment which followed, and the present application for a receiver, are but the successive steps taken in an action at law, and therefore to be governed by rules of mere law, and wholly irrespective of equitable consideration.

"Whether the receiver shall be appointed is dependent upon a statutory condition of fact, — the fact that the corporation has forfeited its corporate rights.

"The Code of Civil Procedure, section 564, so far as pertinent to the case, is as follows: 'A receiver may be appointed . . . when a corporation . . . has forfeited its corporate rights.' And that the defendant is precisely in that category is the purport of the decision already rendered.

"Under the New York code, sections 1798–1801, a receiver is provided for in the judgment itself; under the California code, by an order entered subsequent to judgment. The difference is practically but one of sequence; the principle common to both statutes is, that an ascertained forfeiture implies a receiver. So it was substantially ruled in New York, in 1865, — the statute of that state being then much the same as ours, — in *People v. Washington Ice Co.*, 18 Abb. Pr. 383, that an application for a receiver, made by the attorney-general before forfeiture ascertained, was premature, and not to be entertained by the court.

"Recurring, then, to the statute of this state (Code Civ. Proc., sec. 564), the language is, that upon forfeiture a receiver may be appointed, etc. Now, though the word 'may' is but

permissive in ordinary signification, it here means 'must,' — a receiver must be appointed, etc. That this is the settled rule of interpretation is pointed out in Potter's *Dwarris on Statutes*, text and note, page 220. It is there said as follows: "May," in a statute, means "must" whenever . . . the public have an interest in having the act done which is authorized by such permissive language'; again: 'Words of permission shall, in certain cases, be obligatory; when a statute directs the doing of a thing for the sake of justice, the word "may" means "shall."' So in *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 113, 9 Am. Dec. 274, Chancellor Kent observed as follows: 'And in respect to statutes, the rule of construction seems to be that the word "may" means "must" or "shall," . . . in cases when the public interest and rights are concerned, and when the public have a claim *de jure* that the power shall be exercised.'

"That the public have an 'interest,' that the doing of a particular thing is 'for the sake of justice,' — change 'may' to 'must'; convert a word of permission to one of obligation. This principle is peculiarly applicable to the circumstances of this case.

"To guard the public interest and vindicate justice is the distinctive purpose of this proceeding by the attorney-general; to maintain that a corporation, as being but a creature of the law, must obey the law, — cannot be permitted to violate it with impunity; that its stockholders must respect the obligation they assume to the public when they sought and accepted their franchise at the hands of that public; that they must observe the policy upon which the commercial police power of the state proceeds, — the policy which, notoriously disfavoring restraint of trade, absolutely forbids corporations to embark in monopoly in an article classed among the necessities of human life, — these features characterize this as a case of grave public interest, and one in the vindication of which the court is bound to employ all the powers provided by the law, one of which is the power to appoint a receiver of the estate and effects of the delinquent corporation.

"2. Nor is this conclusion, founded, as it is, upon the text of the Code of Civil Procedure already referred to, inconsistent with section 400 of the Civil Code, to the effect that stockholders in a dissolved corporation may, in the discretion of the court, be permitted to administer and wind up its business affairs.

"In my judgment, this provision has reference only to cases of voluntary corporate dissolution. A similar provision is found in the Revised Statutes of the state of New York (3769, sec. 77), and is there limited to cases of voluntary dissolution, as in the nature of things it ought to be here, under the true construction of our statute.

"In cases of voluntary corporate dissolution, the stockholders are without fault,—or may be,—therefore the court has a discretion to permit them to hold and distribute the corporate assets; but this is not such a case. Here the corporate franchise has not been voluntarily surrendered, but has been forfeited because of the misconduct of the entire body of the stockholders already ascertained,—in fact become the distinct ground upon which the forfeiture proceeds.

"For, as pointed out in my opinion heretofore filed in this case, the judgment in this action, though in form one against the corporation, is in fact against the stockholders, who, as there said, were the actual owners of the corporate franchise a forfeiture of which was adjudged. The misconduct by which the corporate charter was lost was therefore the misconduct of the stockholders sued and making defense here by their corporate name,—American Sugar Refinery Company.

"As observed by Mr. Chief Justice Nelson in *People v. Kingston and M. Turnpike Road Co.*, 23 Wend. 205, 35 Am. Dec. 551: 'Though the proceedings by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court. The powers and privileges are conferred and the conditions enjoined upon them; they obtained the grant and agreed to perform the conditions,' etc.

"Upon this view it would indeed have been somewhat singular had the Civil Code conferred upon stockholders thus convicted of the breach of one important trust the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation. Such inconsistency is not to be attributed to that code. Beside, it will be seen, upon looking into the decisions at large, that such a practice has never been pursued by the courts. Stockholders whose ascertained misconduct has already operated a forfeiture of the corporate franchise have never been permitted to assume the administration of the corporate assets. Even in cases of voluntary dissolution,—cases in which no malfeasance of the

stockholders appeared, — inquiry has often been made by the court as to whether the dissolution had in point of fact been brought about by the misfeasance or mismanagement of the particular person seeking to become a trustee of the corporate affairs. I must therefore decline to permit the offending stockholders here, or their nominees, to become the trustees of the corporate assets.

“3. But one other question remains to be considered, which will now be stated.

“An appeal from the judgment of forfeiture has been taken, — taken and perfected in such a form as to stay the judgment, pending the appeal, if that be possible. The judgment was rendered here on the sixth day of January; on the 8th, this application for a receiver was made, and set down for hearing on the 10th; was actually heard on the twentieth day of January; the appeal was taken on the 18th, while the application was yet pending, and some two days before it was submitted for decision.

“It is now claimed that the judgment is stayed by the appeal, and that, as a consequence of such stay, the power of the court to appoint a receiver has ceased.

“But, in my opinion, no appeal, in whatever form it be taken, can operate a present stay of a judgment of the character of the one rendered in this case. To hold that it can is to imply that a corporation already dissolved for ascertained corporate abuses may by this means practically rehabilitate itself at pleasure, — resume its proper corporate existence, — despite the judgment, and so continue its misemployment of its franchise for an indefinite period of time. The correctness of a construction leading to such results may well be doubted.

“But waiving this, and assuming that the judgment has been stayed by the appeal taken, it would not follow that the authority to appoint has been superseded because of the appeal. The subject of appeals, as well as their effect when taken, is governed by the Code of Civil Procedure (sec. 946). An appeal ‘stays all further proceedings . . . upon the judgment, . . . or upon the matters embraced therein; . . . but the court . . . may proceed upon any other matter embraced in the action,’ etc.

“That the appointment of a receiver is a matter ‘embraced in the action’ has already been pointed out in connection with section 564 of the same code; the appeal from the judgment does not suspend the power to appoint, unless the appoint-

ment be a matter embraced in the judgment, which it is not (as upon inspection of the judgment will appear), or is itself distinctively a proceeding 'upon the judgment.' That the appointment of a receiver in a cause is not a proceeding upon the judgment in that cause, but is merely ancillary in character, is understood to have been often ruled in our courts. It is not necessary for me, however, to cite the cases nor to enter now upon an analysis of the text of the statute, because I consider the recent ruling in *Baughman v. Superior Court*, 72 Cal. 572, as directly in point in support of the power. An appeal from the judgment had been taken in that case, yet the authority of the court over the general subject of receivership appears to have been upheld, notwithstanding the pending appeal from the judgment. In that case it was the power to remove which was immediately in question; here it is the power to appoint; but these powers must co-exist; any construction of the statute which would uphold either must necessarily uphold the other.

"The conclusion reached is, that the application must be granted, and a receiver appointed; an order to that effect will now be entered.

WILLIAM T. WALLACE, Judge.

"Dated February 17, 1890."

As we cannot accept the conclusions reached in this opinion, we will state as briefly as possible in what we think their unsoundness consists.

The assumption which forms the basis of the entire argument is, that the appointment of a receiver to administer its assets is one of the penalties designed, and in effect prescribed, by the legislature as part of the punishment to be visited upon the stockholders of a corporation which by any misconduct of its own has incurred a forfeiture of its charter.

There is, in our opinion, little to justify this assumption, even in the statutes of New York, upon the supposed construction of which so much reliance is placed. But if such were the declared or plainly implied policy of that state, the significant fact remains, that our statutes not only contain no semblance of such a declaration, but that our legislature, in framing the law of this state, while looking to the statutes and codes of New York for a model and guide, has deliberately rejected every provision from which such an implication might arise, and in place thereof has substituted one of opposite import.

In order to a due appreciation of the force and meaning of

these statutes, it is necessary to consider, for a moment, the subject with which they deal.

When a corporation ceases to exist, from whatever cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for neglect or abuse of its powers, it necessarily results that its property is left to be disposed of according to law. Even in those times when the doctrine prevailed that such of its property as did not revert to its grantors was forfeited or escheated to the crown, some officer exercising a general authority under the common law or statutes, or invested with a special authority for the occasion, was charged with the duty of collecting the assets for the benefit of the king, or his donee; and since it has come to be recognized everywhere that upon the dissolution of a trading corporation, its property neither reverts to its grantors nor escheats to the state, but belongs, after payment of its debts, to those who were stockholders at the date of dissolution, the appointment of some officer with the same or more minutely defined authority is a recognized necessity. Some means must be provided for winding up the corporation and distributing its assets according to the equitable rights of those interested. In the absence of any statute regulating the matter, a court of equity would have the undoubted right, in a proper proceeding instituted by a creditor or a stockholder, to appoint a receiver to administer the property. But in many of the states, statutes have been passed expressly providing for the appointment of receivers, or trustees exercising the same functions, though sometimes called by other names. In all cases it is made their duty to collect the assets, pay the debts, and distribute the surplus *pro rata* to the stockholders. As this is precisely what a court of equity would have done in the absence of a statute, it is to be inferred that the motive of such legislation has been to accomplish some other object,—some object, that is to say, for which express legislation was necessary. This inference is fully justified and amply borne out by reference to the different statutes. They seem to have been enacted with the object, in some instances, of abrogating the old law of forfeiture, and reversion; in others, of committing the administration to other courts than courts of equity; in others, to provide general and uniform rules of procedure, as to giving notice to creditors, etc., to take the place of rules of court and specific orders to be made by the chancellor in each particular case; in others, to keep the matter out of the courts altogether, as by allowing

the dissolved corporation to continue its existence for a term for purposes of liquidation, but for no other purpose. The whole mass of this legislation seems to be pervaded by the one idea of simplifying, expediting, and cheapening the means of accomplishing the one object of transferring to the stockholders of a defunct corporation their full share of its surplus assets. There is, from beginning to end, no suggestion of added penalties or punishment after death.

Now, to revert to the New York statutes in force at the date of the decision in *People v. Washington Ice Co.*, 18 Abb. Pr. 382, cited in the opinion of Judge Wallace. They provided, as ours do, for both voluntary and involuntary dissolution of corporations, and in express terms directed the appointment of receivers in all cases, whether voluntary or involuntary; they also contained minute and specific directions as to the duties of receivers, notice to creditors, fees and commissions, settlement of accounts, etc., very similar to our statutes regulating the proceedings of executors and administrators.

The object of such legislation is apparent, and clearly it is not the infliction of penalties, but merely the conservation of rights.

In view of these provisions of the New York statute, it is difficult to see how the general principle can be deduced, from the decision referred to, that "an ascertained forfeiture implies a receiver." That was not the question litigated in the case, and was not decided. The point decided was, that in an action to forfeit a charter a receiver could not be appointed until after judgment dissolving the corporation; in other words, that there is no forfeiture in the sense of the statute until the judgment of dissolution is entered. All that this implies is, that after judgment a receiver may, not that he must, be appointed, and therefore the implication falls short of what the statute under consideration expressly enjoined, viz., that it should be "the duty of the attorney-general, immediately after the rendition of such judgment [of forfeiture], to institute proceedings for that purpose" (the appointment of a receiver): Voorhies's Code, sec. 444.

Nothing, therefore, can be gained for the argument by reference to this decision. It merely construes the New York statute on a point not in controversy here. And even if it had been otherwise, the question would have remained, whether our law is the same in substance as the law of New York.

The opinion of the superior court assumes that it was "much the same as ours."

We think, on the contrary, that the points of difference between our law and that of New York are much more striking and manifest than the points of resemblance. The laws of New York, it is true, recognize, as our laws do, and as, in the nature of things, every law on the subject must, the necessity of providing some means of administering the assets of a defunct corporation, and the propriety, in the absence of other provision, of appointing a receiver for that purpose; but there the resemblance ends. In New York, as we have seen, there was no other provision, and the appointment of a receiver was made obligatory in all cases of dissolution, whether voluntary or involuntary. That was the rule, to which there was no exception. Under our codes, on the contrary, the rule is, not to appoint a receiver, but to leave the whole matter of liquidation and distribution to the exclusive control of the directors of the corporation in office at the date of dissolution. The appointment of a receiver is the exception, not the rule, and is not to be made unless some party interested, either a creditor or a stockholder, can show that for the protection of his rights the appointment of a receiver and the administration of the assets under the control and superintendence of a court of equity is necessary; and even then no receiver will be appointed upon his *ex parte* application without requiring ample security by his undertaking with sufficient sureties for all damages that may be caused by the appointment if it shall turn out that it was made without sufficient cause.

In support of this statement, we refer to the following provisions of the codes:—

Sections 399 and 400 of the Civil Code are as follows:—

"Sec. 399. The dissolution of corporations is provided for, — 1. If involuntary, in chapter 5 of title 10, part 2, of the Code of Civil Procedure [secs. 802, 810]; 2. If voluntary, in title 6, part 3, of the Code of Civil Procedure [secs. 1227–1233].

"Sec. 400. Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

Sections 565 and 566 of the Code of Civil Procedure are as follows:—

"Sec. 565. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

"Sec. 566. No party or attorney or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an *ex parte* application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause, and the court may, in its discretion, at any time after said appointment, require an additional undertaking."

It will be observed that section 399 of the Civil Code refers to those parts of the Code of Civil Procedure which provide for involuntary as well as voluntary dissolutions, and that section 400, by its terms, applies as well to one kind of dissolution as to the other. By its own unaided force, without the intervention, or any necessity for the intervention, of a court, it makes the directors managers of the affairs of the corporation and trustees for the creditors and stockholders, with full power of settlement. These trustees, like trustees in general, are, of course, amenable to the jurisdiction of a court of equity, and may be called to account there for any neglect of duty or abuse of power. But until they are so called to account in an independent action or proceeding by a party in interest, no court has any excuse for interference; and if they are sued and brought into court without sufficient cause, even by a creditor or stockholder, they will recover costs.

But in the opinion of the superior court these provisions of our statutes are, upon their true construction, to be limited to cases of voluntary dissolution. It seems to us that the terms

of the law are too plain in an opposite sense to admit of construction, and even if it were otherwise, that the reasons given for the construction adopted are wholly insufficient. In section 399 of the Civil Code, separate reference is made, first, to cases of involuntary dissolution, and second, to cases of voluntary dissolution. Then, right on the heels of this reference, follows the provision for the settlement of the affairs of "such corporation." If it was the intention of the legislature to limit this provision to cases of voluntary dissolution, nothing could have been easier or more natural than to say so. And if it were true that this section of our code is similar to the section cited from the Revised Statutes of New York (3769, sec. 77), and that that section is limited to cases of voluntary dissolution, the fact that our legislature has adopted the provision without the limitation would be a strong circumstance indicative of an intention to make its operation general.

But in truth the two sections are not substantially the same. Section 400 of our Civil Code, as is apparent, provides a means of settlement of the affairs of a dissolved corporation without the intervention of a court, unless such intervention is specially invoked, and that is its whole scope. The section cited from the Revised Statutes of New York is part of a scheme in which the rule is to appoint a receiver in all cases; and it merely provides that any of the directors, trustees, or other officers of such corporation, or any of its stockholders, may be appointed receivers. It is not by any means clear, moreover, that this provision was limited to cases of voluntary dissolution. It is true that it is found in an article relating to voluntary dissolutions, but that article is by reference made part of the law of involuntary dissolution. The very section of the New York Code of Civil Procedure, section 444, which enjoins upon the attorney-general the duty of applying for a receiver whenever the charter of a corporation has been forfeited at the suit of the state, makes the article relating to voluntary dissolutions the measure and limit of the power of the court "to restrain the corporation, to appoint a receiver of its property, and to take an account, and to make distribution thereof among its creditors"; from which it is perfectly evident that the legislature of New York intended no discrimination against the stockholders of a corporation which had forfeited its charter by misconduct; for if they were to enjoy every advantage in the management and distribution of their property that the law afforded to stockholders in corporations voluntarily dis-

solved, how can it be claimed that the law was framed with a view to punishment in one case, unless that was its object and effect in all cases?

It is therefore plain that if any foundation exists for the notion that the appointment of a receiver, in case of a forfeited charter, is part of the punishment prescribed for the offenses of the corporation, that foundation must be sought elsewhere than in the statutes and decisions of the state of New York.

Where, then, is it to be found?

The first general consideration suggested in the opinion of the superior court is, that "it would indeed have been somewhat singular had the Civil Code conferred upon stockholders thus convicted of the breach of one important trust the immediate exercise of another trust, and one in itself of no slight importance,—the trust of administering and distributing the assets of the dissolved corporation. Such inconsistency is not to be attributed to that code."

We admit that no inconsistency should be attributed to the law; but before we construe a section of the code contrary to its obvious meaning, we should be very certain that such construction is necessary, in order to prevent a conflict with some other provision of controlling force, or some legal principle of general application. It is not pretended that the literal purport of section 400 of the Civil Code and section 565 of the Code of Civil Procedure conflicts with any other statutory provision; but the idea seems to be, that it is absurd to suppose that the legislature would have left to the directors of a corporation convicted of violating their duty to the people of the state the power and discretion to pay their own debts, and divide their own property, subject to the right of a court of equity to interfere and compel them to proceed properly, if any occasion for such interference should arise.

We confess that there does not appear to us to be any absurdity in this supposition. Because a corporation has violated its duty to the public, it does not follow that its members cannot be trusted to look out their own interests. Quite the contrary; for it is usually a too exclusive regard for their own interests that constitutes their dereliction to the public. As to creditors, their interests must in most cases be opposed to the appointment of a receiver. They will be paid more quickly and more certainly without a receiver than with one. If there is any one thing more certain than another, it is that the appointment of a receiver implies a material diminution

of the fund out of which creditors are to be paid. For, in the first place, the fees of the receiver, his counsel, and assistants, are to be subtracted. Then the estate must, in many cases, as it has been in this case, be condemned to unproductive idleness and disuse, and exposed to danger of loss and dilapidation from rust and decay during the long and tedious progress of the legal proceedings that are necessarily entailed. And all this time the creditors must wait and look on, while the fund upon which they rely for payment is being depleted by the processes above referred to. On the other hand, supposing the affairs of the defunct corporation to be under the control of its late directors as trustees for its creditors and stockholders, the creditors have nothing to do but present their demands and receive payment in the ordinary course of business, or if payment is refused or delayed, they may proceed to enforce their demands. How much better this is for the creditors than to have to wait upon the motions of a receiver, and the court under whose order he acts, every one knows who has had any experience of the two methods of settling the business of a partnership or a corporation. And then it is, as we have seen, always at the option of a creditor or stockholder to have a receiver, if they can allege facts showing that a receiver is necessary.

So far, therefore, as the rights and interests of the sole beneficiaries of the trust are concerned, there is no need to construe section 400 of the Civil Code and section 565 of the Code of Civil Procedure contrary to their express terms, in order to rescue the legislature from the imputation of having enacted an absurdity.

On the contrary, the rule which they prescribe, according to their natural and obvious construction, by which they apply as well to cases of forfeiture of charter as to cases of voluntary dissolution, is most salutary, so far as the beneficiaries are concerned, and such construction must prevail, unless, indeed, it be true that the paramount interests of the people of the state demand a different construction.

This proposition that the people of the state have an interest in the appointment of a receiver, whenever the charter of a corporation has been forfeited, was decided adversely to the contention of the respondent at an early stage of these proceedings in ruling upon a preliminary objection made by counsel for the state, who appeared specially for that purpose, —an objection founded upon a clause of the twenty-eighth rule

of this court, which reads as follows: "In case any court, judge, or other officer, or any board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ to serve, or cause to be served, upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service."

Neither the petition nor the writ herein was served upon the state or its attorneys, and the objection made in behalf of the state was, that the hearing could not proceed, and that the alternative writ must be quashed, for the reason that it appeared on the face of the petition that the state was the real party in interest, or whose interest would be directly affected by the proceedings.

The court, however, were unanimously of the opinion, and so decided, that the state had no interest to be affected, and that the only persons interested were the creditors and stockholders of the corporation. It must be confessed, however, that when this ruling was made we did not understand, and of course did not consider, the real position of respondent with respect to this matter. It did not occur to us, and if the point was suggested in the course of the argument upon this preliminary objection, it failed to impress us at the time, that any person could have an interest in the appointment or removal of a receiver, except those who would be entitled to share in the distribution of the fund committed to his control; and as it was conceded that the state had no interest in the fund, we naturally concluded that the interests of the state could not possibly be affected by any result of these proceedings, and ruled accordingly.

But in the light of the fuller argument made at and since the hearing, we perceive that the real claim of the state remains to be stated and considered.

Before, however, proceeding to this discussion, we take occasion to say a few words as to the proper construction of the rule of court above cited. It does not, as counsel seem

to suppose, require that the state should have been made a formal party to this proceeding, by being named as a defendant in the petition or writ, but only that the names of the parties really interested should be disclosed by the petition, and that service of a copy of the petition and writ should be made upon them: *Baker v. Superior Court*, 71 Cal. 583.

The effect, therefore, of a failure to serve such parties would not be an abatement of the whole proceeding, but, at most, to require a postponement of the hearing or trial until they could be served and have a reasonable time to appear.

On the face of the petition in this case, it did not seem to us that the state could have any interest in the controversy over the appointment of the receiver. If it had been otherwise, it would perhaps have been our duty in advance to order service of the petition and writ upon the representatives of the state, and certainly we should have been bound, of our own motion, to require proof of such service before proceeding with the hearing of the rule to show cause; or if, on the hearing, the fact had been developed that a party not named or served had an interest to be affected, it would have been our duty to suspend the proceeding until such party was served and brought in. As it was, however, we were proceeding properly with the hearing when the objection of the state was interposed. The motion made to quash the alternative writ was not sustainable upon any view of the state's rights or interest in the matter, and after listening to the argument then advanced in support of the state's claim of interest, and its right to the benefit of the rule, we decided that the claim was unfounded, and that the rule did not apply.

But if we had then understood, as we now understand, the ground upon which the state bases its claim of interest, we should probably have ordered service of the petition and writ on the attorneys of the state, and should have allowed them in that capacity to take part in the subsequent proceedings.

No harm, however, has resulted from our misconception of the state's position. Although there was no service of notice upon its attorneys, *eo nomine*, such service was made upon the judge of the superior court, who has been formally represented throughout these proceedings by one of the attorneys of the state, and actually by both of them. The whole object of the rule, therefore, has been fulfilled so far as the state is concerned, the only difference being that its attorneys have had only one copy of the writ and petition instead of two, and that

they have been compelled to speak in the name of the superior judge, instead of that of the state. But in his name and upon his behalf they have presented every argument and raised every issue which could have been made in behalf of the state if it had even been a formal party to the proceedings, which, as we have seen, the rule does not require.

We will now return from this digression to consider what those arguments are.

It will be seen, by reference to the opinion of the superior court, above quoted, that the provision of section 564 of the Code of Civil Procedure, to the effect that a receiver may be appointed when a corporation has forfeited its charter, is construed to mean that in such case a receiver must be appointed, and this because the public has an interest that the power should be exercised. To our minds, it is perfectly clear that the true construction of this clause of section 564 is found in the very next section of the code, wherein it is specifically enacted that "upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers," etc. Here is an express enumeration of the parties, and the only parties (*expressio unius est exclusio alterius*), whose interest demands that "may" should be read "must"; and considering this language in connection with section 400 of the Civil Code, which, as we have seen, provides that the directors in office at the date of its dissolution shall settle the affairs of a corporation unless some other persons are appointed, we should never have thought of looking further for a definition of the circumstances under which a receiver could be appointed. In terms, both sections apply as well to cases of involuntary as to cases of voluntary dissolution, and they do in fact provide a most salutary rule for the protection of all persons interested in the property. But it is held that they must be construed out of their obvious sense, and limited in their application to cases of voluntary dissolution, because, and only because, in cases of forfeiture for corporate misconduct the stockholders cannot be adequately punished or restrained without the intervention of a receiver, and, consequently, that the interest of the public, in the imposition of such punishment and restraint, requires the conversion of "may" into

"must," thus making the appointment of a receiver obligatory in all cases of forfeiture.

This proposition, which is, in effect, stated in the opinion above quoted, is much more plainly and directly put in the argument made by the respondent here. He asks if it is possible that this controversy between the state and a concern with millions of capital is limited to the imposition of a fine of five thousand dollars, and the cancellation of a charter the duplicate of which can be obtained while we are talking here, and he answers his own question as follows: "I understand the great interest of the state is to break down the monopoly. To do that, it seizes the means and utensils,—the business with which the monopoly has been proceeding. It scatters it. It divides it up. A receiver is appointed for that purpose. That is part of the penalty. That is a part of the penalty provided by law because they have forfeited their corporate rights, — no other reason."

Translated into terms specifically applicable to the case before us, the meaning of this is, that if a corporation organized for the purpose of refining sugar enters into a combination with other corporations, through the medium of what is called a trust, for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not only forfeit its charter and impose the utmost fine which the law prescribes for such offenses, but they must go further, and by the hands of a receiver seize into their possession all the property of the defunct corporation, and especially its sugar-refining plant, not for the purpose of preserving and protecting it, and as speedily and economically as possible distributing it to those who are equitably entitled, viz., creditors and stockholders, but for the quite opposite purpose of shutting it up and condemning it to rust and idleness until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine, and one which does not, upon any ground, commend itself to our judgment.

It may not be the rule in this state to construe penal legislation strictly, but even here, when a court is asked to impose a penalty for infraction of a law, the first inquiry is, What penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes, but in the express term of the act defining the offense.

Now, what is the case here? In section 803 of the Code of

Civil Procedure, the legislature has enjoined upon the attorney-general the duty of bringing actions for the forfeiture of corporate franchises whenever he has reason to believe that they are unlawfully held or exercised. This was his sole authority for bringing his *quo warranto* against the American Sugar Refinery Company, and it is upon this chapter of the code that the judgment of forfeiture depends. Section 809, in the same chapter, defines the character of the judgment that must be rendered when the defendant is found guilty, viz., that the defendant be excluded from the franchise it has abused, and "the court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state." This is absolutely all the punishment that the legislature has in terms prescribed; and if any other was intended, especially if such other punishment was designed to be severe beyond comparison with that expressly defined, it is passing strange that the courts should have been left to work it out by a doubtful construction of other parts of the codes.

But, to our minds, the gravest objection to the doctrine lies in the consequences which it involves. Obviously, there is no measure or limit to the punishment which may be inflicted in the manner indicated, except in the discretion of the court and the moderation of its receiver. The duty of the receiver is not conservation, but destruction. In whatever business the offending corporation may have been engaged, his first step must be to shut up its works; however vast the capital invested, it must be condemned to lie idle and unproductive until it can be divided up and scattered. It must not be sold as a whole, complete and adapted to the work for which it was designed, and for which alone it possesses any considerable value. To do so would defeat the whole object of the receivership; for not only would the offending stockholders get off without adequate punishment, but there would be nothing to prevent them from buying in their own property and again putting it into the combination. It must therefore be divided up and scattered, and its value in great measure destroyed. The stockholders, when they finally realize upon their property, must be content to receive, not the proceeds of a well-appointed manufactory in complete running order, but the price of a lot of old iron and second-hand machinery, sold in lots according to the discretion of a receiver, acting with a

view, not to their interest as stockholders, but solely with a view to the interest of the public in punishing them.

We cannot assent to a doctrine involving such consequences. If it is really true that our laws, as they are written, provide no adequate punishment for corporate transgressions, let the legislature take the matter in hand. It is no part of the function of a court to supply the want of penal legislation. Its judgments in such case, beside being wholly unauthorized, would always operate as bills of attainder or *ex post facto* laws, both of which are not only abhorrent to our ideas of justice, but are expressly forbidden by our charters of government.

But perhaps it is not fair to regard the doctrine under discussion as implying that the primary object of the laws, as it construes them, is the punishment of the stockholders. It may be said that the real purpose is only to break up the monopoly, and that the punishment involved is merely incidental and unavoidable; that it is right to break up the monopoly, and if, unfortunately for them, the stockholders suffer in the process, they have themselves alone to blame.

Regarded from this point of view, it seems to us that the doctrine is still wholly indefensible. When a corporation is dissolved, its property, as we have seen, vests in its stockholders, subject only to the claims of creditors, and is thereafter held upon the same tenure and subject to the same conditions as similar property owned by other natural persons. What others may do they may do. They owe no further or higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the state can take a sugar refinery away from a private citizen who has inherited it, or bought it, or built it, and can shut it up preparatory to dividing and scattering it, upon the ground that he has entered into an agreement with some other private citizen owning another refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the state in taking similar property from natural persons who have succeeded thereto on the death of a corporation.

Confessedly, there is no warrant to be found for such a proceeding in case of a natural person.

That contracts in restraint of trade are unlawful, or, at least, opposed to the policy of the law, is conceded, but the only penalty they entail is, that courts refuse to enforce them,

just as they refuse to enforce any contract which is opposed to public policy or good morals; but no one ever heard of a proceeding to confiscate or destroy, either wholly or partially, the property which is the subject of such a contract. So far the legislature has seen fit to attach no other punishment to contracts of natural persons in restraint of trade than to make them non-enforceable; and where the legislature has stopped, it is not only becoming, but necessary, that the courts should stop.

As to the property of a corporation, the legislature has given no indication of an intention to forfeit it or take it away from the stockholders, except to the extent of a fine of five thousand dollars, which the court is authorized in its discretion to impose. What is forfeited to the state, and all that is forfeited, is the charter,—the right to be a corporation; and this is presumed solely upon the ground that the condition upon which it was granted has been violated. The doctrine is, that corporate charters are granted upon the implied condition that the privileges conferred will be used for the advantage, or at least not to the disadvantage, of the state. If this condition is broken, the charter which the state has given is taken back by the state; but the property which the corporation has acquired with its own means goes to those who have paid for it, and they have the right to deal with it just as others similarly situated may deal with their property. Whatever the law prevents other natural persons from doing they are prevented from doing,—nothing more.

This doctrine is plainly enough indicated in the case of *People v. North River etc. Co.*, 22 Abb. N. C. 164, cited and relied upon by respondent, and in the cases therein referred to, and it is shown, moreover, in those cases, that the privileges and powers of a corporation are essential to membership of the trust and to any effective monopoly. To become a member of the trust, the sugar refiner must be a corporation, and the corporation being dissolved, it is impossible that its stockholders should keep up the arrangement. And so as to monopolies in general, they are only dangerous when corporations are the parties to the agreement by which they are attempted: *Leslie v. Lorillard*, 110 N. Y. 519. At least this is the opinion of some courts, and it suggests a reason why the legislature has omitted to prescribe any penalty beyond non-enforcement in case of such agreements between natural persons. But we need not speculate upon these matters. The law being plain, we are not concerned with its expediency.

The conclusion which inevitably follows from these views is, that, in an action under sections 802 et seq. of the Code of Civil Procedure, the rendition of the judgment authorized by section 809 ends the proceedings so far as the superior court is concerned, and that no receiver of the corporate property can be appointed unless a new and distinct proceeding is commenced by a creditor or stockholder of the corporation: Code Civ. Proc., sec. 565.

Such new and distinct proceeding upon the part of the beneficiaries, or some of them, is the essential condition of any jurisdiction in the court to take the property out of the control of the trustees designated by law: Civ. Code, sec. 400. An order appointing a receiver without such application is therefore void, not only as to strangers to the *quo warranto*, but is even void as to the corporation and its stockholders and vendees.

We have no doubt of the correctness of this conclusion; but if we were wholly mistaken in our views, and if it were true, as held by the respondent, that the appointment of a receiver for the purpose of inflicting one of the penalties designed by the law and essential to its efficacy is obligatory, we cannot see how it is possible to avoid the conclusion that the enforcement of this as well as other parts of the penalty was suspended by the appeal from the judgment.

According to the plain and unambiguous terms of the statute, proceedings upon any appealable judgment or order may be stayed by the filing of a sufficient undertaking, except in a few enumerated cases, of which this is not one: Code Civ. Proc., sec. 949. Confessedly, a sufficient undertaking was filed in this case to stay the judgment, if that was possible: Opinion of Judge Wallace, *supra*.

But it is held, in the face of the statute, that a stay was not possible, and this, again, upon the plea of necessity, in order to prevent an apprehended abuse. We do not think the reason suggested is sufficient to override the law. The allowance of an appeal in such cases implies the right of the corporation to question the validity of a judgment of forfeiture until it has been affirmed here; and it is not correct to say that a stay of proceedings would operate a rehabilitation of a dissolved corporation, when the sole object of the appeal is to determine the question whether there has been a valid judgment of dissolution.

But evidently the respondent was unwilling to stand upon

the proposition that a stay was not possible. Waiving that, and assuming that the judgment has been stayed, he concludes that the power to appoint a receiver is, nevertheless, not suspended because the order of appointment is not embraced in the judgment, and is not a proceeding upon the judgment. It is true that the order of appointment is not embraced in the judgment; but that is not the test. An execution is not embraced in the judgment, but an appeal duly perfected stays execution. In truth, it is not correct to say that a judgment or matters embraced in a judgment are stayed by the appeal, and the statute does not say so. What it says is, that proceedings upon the judgment and matters embraced therein are stayed by the perfecting of an appeal: Code Civ. Proc., sec. 946; that is to say, the execution—the enforcement—of the judgment is suspended.

Now, here it is conceded that no receiver of the corporation could be appointed until after judgment, and that the only purpose of his appointment is to carry the judgment into effect,—by taking away the property of the corporation and scattering and dividing it. How, then, is it possible that this is not a proceeding upon the judgment? According to the argument, the things to be done by the receiver constitute the only substantial and effective punishment which it is in the power of the state to inflict; the rest is a mere trifle. But it is, nevertheless, held that this ruinous penalty which follows the judgment, and but for the judgment could never be inflicted, is not a proceeding upon the judgment, and therefore is not stayed by the appeal. And this conclusion is rested upon the authority of rulings which it is said have often been made by our courts.

Undoubtedly it has often been held that the appointment of a receiver is merely ancillary, and undoubtedly his appointment often is merely ancillary; that is to say, he is appointed before judgment for the purpose of protecting, pending the litigation, property which is the subject of the litigation. But sometimes he is appointed after judgment for the purpose of carrying the judgment into effect; in which case his appointment and his proceedings thereunder are not merely ancillary. In the former case, his functions are not necessarily suspended during the appeal, and neither is the power of the court to remove him or control him suspended by the appeal. But in the latter case—as, for instance, where a receiver has been appointed to sell mortgaged prem-

ises under decree of foreclosure—his proceedings are suspended by the appeal.

The only case cited by respondent—a case supposed to cover the whole ground and to conclude the question—is that of *Baughman v. Superior Court*, 72 Cal. 572, which was of the former class.

There the litigation was about the right to certain grain described in the pleadings. Upon the filing of the complaint, and upon the *ex parte* application of the plaintiff, the court appointed a receiver to take charge of the grain, pending the action, to preserve it for the benefit of the party who might prove to be entitled to it. The defendant demurred to the complaint; his demurrer was sustained, and final judgment entered in his favor, from which plaintiff appealed to this court. After the appeal was perfected, the superior court discharged the receiver, and this court decided that the power of the superior court to do so was not suspended by the appeal. We do not doubt the correctness of that decision; but we are unable to see the resemblance between the case where a receiver is appointed before judgment, to preserve property pending the litigation, and one in which he is appointed after judgment, to dispose of the property in order to make the judgment effective. We know of no case that comes nearer supporting the proposition to which it was cited than this case, and we feel certain that there is as little to support it in the rulings of our courts as in the text of the codes.

As to considerations of expediency, they should not weigh when the law is plain; but if we were to look to the consequences of the doctrine contended for, we should find therein nothing to commend it.

We assume, for every purpose of this decision, that the judgment of forfeiture in this case was not only just, but legal; correct not only in substance, but in form,—free from error. But it does not follow that all similar cases will be equally well decided.

It is possible—the constitution and the laws assume the possibility—that some case may arise in which the judgment of forfeiture will be not only erroneous, but unjust, and that it will be reversed on appeal. But the rule applied in this case must also be applied in that case. If this judgment must be executed in the manner indicated, so must that.

A receiver must be appointed; he must seize all the property; he must shut up the factories, discharge the employees,

prevent the fulfillment of contracts, subject the corporation to every sort of loss and damage that can be inflicted by the stoppage of a great and complicated industry having its ramifications throughout the business centers of the entire coast. And not only this, for if he must go this extent,—if nothing the corporation or its stockholders can do will stop him,—then nothing but the forbearance of the superior judge will prevent the completion of the process.

For this injury caused by an erroneous judgment, a reversal on appeal affords no redress; for no security has been given by the undertaking of sureties, or otherwise, to indemnify the corporation or its stockholders. The sureties of the receiver merely undertake that he will faithfully execute the orders of the court; and according to the precedent in this case, they are bound in a trifling amount. If the receiver obeys orders, they are exonerated; and if his orders contemplate the infliction of punishment by the indirect and partial destruction of the property, the more completely they are exonerated, the greater the damage inflicted for which there is no redress.

Unless it is to be assumed that such results as these comport with the justice and policy of a great state, the inevitable consequences of the doctrine contended for utterly condemn it.

If, therefore, the state could demand the appointment of a receiver upon the ground and for the purposes stated, the appeal operated as a stay of such proceeding, and for that reason the appointment in this case would have been an excess of authority. But we do not rest our decision on this ground. We rely upon the proposition that a receiver of a dissolved corporation is only to be appointed when necessary for the purpose of preserving and distributing the property, and only upon application of a party interested, viz., a creditor or stockholder. This conclusion relieves us of the necessity of dwelling at length upon other objections to the validity of the order of the superior court. If it was totally void as to all the world, it was, of course, void as to these petitioners, without regard to the special manner in which they were affected by it.

It is proper, however, to add that we think these objections urged by petitioners in their character as purchasers of the refinery are well founded.

They were not parties to the *quo warranto* in their character

of purchasers. It may be true that the stockholders of a corporation are in a certain sense parties to an action to forfeit its franchise, but they are not parties in any other sense than that they are bound by the consequence of such judgment as the court in that action has power to give. If the court goes outside of the issues in the action, and renders a judgment or makes an order embracing matters entirely foreign to such issues, certainly the stockholders are not bound by such judgment or order.

Even conceding, then, for the sake of the argument, that the order of the superior court would have been valid if confined to property of the corporation, it cannot be claimed that it was valid if it embraced the property of vendees of the corporation.

There does, indeed, seem to be a sort of claim hinted at, rather than directly asserted, in one of the briefs, that a purchase *pendente lite* is in fraud of the rights of the state in such cases as this, and therefore void. But there appears to be no foundation for this claim. The state by its action acquired no lien on any of the property of the corporation, and it is difficult to understand upon what ground it can attack a sale *pendente lite*.

Up to the date of its dissolution, the corporation had the same power of disposing of its property honestly and in good faith that any corporation has, and like any other corporation, it could sell to its stockholders. It matters not, therefore, that these petitioners were stockholders; they had the right to purchase, and if they did so, and entered into possession of the property, they had the same rights in their character of purchasers that any stranger would have had.

It is claimed by respondent that the evidence in the *quo warranto* case showed that the transfer to the petitioners was a sham. This may be so, but the petitioners were not parties to that proceeding for the purpose of defending their purchase. Its validity was not in issue in that action, and could not, by any legal possibility, have been tried and determined therein. If any evidence came out in relation to the transfer, it was but incidental to other issues, and the petitioners could have no opportunity of rebutting it. If the *bona fides* of their purchase was to be attacked, and the validity of the transfer drawn in question, they were entitled to their day in court, and an opportunity of adducing testimony to sustain their claim of ownership.

But it is said these petitioners did appear, did submit themselves to the jurisdiction of the court, and did have an opportunity to contest the making of this order; and consequently that the order, even though erroneous, is binding on them until reversed. The foundation for this assertion is, that in response to the rule to show cause why a receiver should not be appointed, these petitioners, in common with all the other stockholders of the corporation, filed an affidavit showing that there were no creditors, and a request that the trustees of the corporation might be allowed to settle its business. In other words, they opposed the appointment of a receiver, upon the ground that no party in interest asked or desired a receiver. This is all that can be said; they opposed the appointment of a receiver of the property of the corporation. There was not a word in the pleadings or judgment in the original action, or in the rule to show cause, about any specific property, and of course no issue or opportunity to try the validity of the transfer of the refinery to the petitioners. The order therefore assumed to determine a question that was never tried, and never anywhere put in issue.

But the form of the order is defended on the ground that "the rule is well settled that the order should describe, with sufficient certainty, the property which the receiver is to take, and unless this is done, he cannot hold it."

Of course the property must be described with sufficient certainty; but it is sufficient, in appointing the receiver or assignee of an insolvent, or a corporation, or partnership, or the executor or administrator of a decedent, to mention, generally, all the property of the insolvent, the corporation, the partnership, or the decedent. If a specific description was necessary, what would justify the receiver in this case, or in any of the cases supposed, in taking property not specifically described? The truth is, in all such cases the receiver justifies and defends his possession by showing title in the person under whom he claims. Of course, when a litigation concerns some specific property described in the pleadings, it is proper, in appointing a receiver, to so describe the property in the order. But such is not the case here. And even in cases where a specific description is appropriate, it gives the receiver no right to take the property from the possession of a stranger to the action.

The case of *Ex parte Cohen*, 5 Cal. 494, is cited to sustain the proposition that the court had power and jurisdiction to

decide whether the petitioners herein were in possession as agents or trustees of the corporation.

The case does not sustain the proposition. It merely holds that a court may, in a proper case, order, not only the party, but his agents and servants, to deliver property to a receiver. But it does not decide that when a third party is in possession, claiming to be owner in his own right, a court may determine without a hearing that he is a mere agent or servant. To say that a court may make an order binding upon the servant or agent of a party to the action does not mean that a court or the receiver may take property out of the possession of a stranger claiming it as a purchaser in good faith, and throw upon him the burden of proving that he is not an agent or servant.

Another objection urged by counsel for respondent is, that these petitioners, having tried the *quo warranto* case in the superior court on the theory that the corporation was carrying on the business of the refinery, are estopped from asserting here that they are the owners.

There are many answers to this objection; but we deem it sufficient to say that we can look only to the pleadings, findings, and judgment in the *quo warranto* case to find what was tried, or what was the theory of the trial. The issues in that case all related to the conduct of the corporation prior to the filing of the information by the attorney-general, while the claim of the petitioners is, that they purchased the property after all the pleadings were filed, and just before the trial.

Besides, the evidence to which we have been referred shows very clearly that the transfer to petitioners was disclosed on the trial, and it cannot be said that they practiced any concealment or deception as to their claim, even if their purchase, pending the action, had been material. We do not see how it was material, but whether it was, or not, it cannot be doubted that the superior court was fully advised of their claims before the receiver was appointed. How else, indeed, could it have been concluded that the transfer was a sham?

We have thus gone cursorily over the propositions most strongly pressed by counsel in the attempt to sustain this order. They all rest upon the assumption that the court was authorized, without any application by a creditor or stockholder, to appoint a receiver. That assumption being shown to be unfounded, all the propositions resting upon it necessarily fall, but nevertheless we thought it proper to notice them.

We also desire, before taking leave of this branch of the case, to say a word as to the decision in *Eastline R. R. Co. v. State*, cited in an *addendum* to respondent's brief as "decisive of the whole question raised by petitioners." We cannot see that it decides anything in point. It merely holds that a Texas statute which directs the appointment of a receiver in cases of forfeiture of corporate franchises is constitutional. There is no question here as to the constitutionality of a statute. We have no such statute.

We come now to the questions as to the remedy.

Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of the jurisdiction of such tribunal or officer, and the writ issues in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law: Code Civ. Proc., secs. 1102, 1103.

We have shown that the superior court, in appointing the receiver, exceeded its jurisdiction, and there is no question that the petitioners are seriously injured by the enforcement of the order. If, then, they have no plain, speedy, and adequate remedy in ordinary course of law, they are clearly entitled to the benefit of the writ of prohibition to arrest the proceedings under the void order.

It is claimed, however, that, so far as the superior court is concerned, there is nothing to arrest; that its order was made and executed before the alternative writ was issued; that the receiver alone is now acting, and that the writ does not run against him.

It is true, the writ does not run against ministerial officers, and it is also true that its operation is preventive, rather than remedial. But property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver, which holds, administers, and disposes of the property in his hands; and so long as the property remains undisposed of, action by the court is necessary. In such case there is judicial action to be arrested, injury to be prevented; and a writ of prohibition is appropriate for that purpose. The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act

independently of the court, from which he derives all his authority.

In this case, when the petition was filed, and our alternative writ directed to issue, the receiver, as we shall see, was still striving to gain complete possession of the refinery and other property claimed by the petitioners; and even if he had been in complete control, that would have been but the first of a series of steps to be taken in carrying out the purpose of his appointment. The keeping of the property in such a case is a continuous wrong; the closing down of the works is an independent wrong; the use of a portion of the property to preserve the rest is an unlawful interference with the rights of those lawfully in possession. Besides all this, there remained to be carried out the sale and final distribution of the property.

By the very terms of the order appointing the receiver, he is to hold the property subject to the further orders of the court concerning it, and the necessity of such further orders would be implied, if it had not been expressly indicated.

As we understand the authorities on this point, the operation of the writ of prohibition is excluded only in cases where the action of the inferior tribunal is completed, and nothing remains to be done in pursuance of its void order. If its action is not completed and ended, its further proceedings may be stayed, and if it is necessary for the purpose of affording complete and adequate relief, what has been done will be undone.

If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy. Great reliance is placed by counsel for respondent upon the decisions of this court, such as *Chester v. Colby*, 52 Cal. 517, and *Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 476, to the effect that when an inferior court or tribunal is proceeding, or threatening to proceed, in excess of its jurisdiction, the objection to its want of jurisdiction must be first submitted to such inferior court or tribunal, and by it overruled, before resort is had to a higher court for a writ of prohibition; and undoubtedly such is the established rule of practice in this state. But if this is the law, it must inevitably happen in every case — as it would probably happen in many cases under any rule — that the lower court will make its ruling on the question of jurisdiction before any prohibition can be sued out, and if it holds that it has jurisdiction, and makes orders in consonance with that view, the writ of prohibition will be of no avail unless it

affords the means, not only of arresting future action, but of undoing past action. In other words, the two positions contended for would practically abolish the remedy.

No better illustration of the working of this theory can be found than is afforded by the present case. When the order to show cause why a receiver should not be appointed was served, neither these petitioners, nor the defendant corporation, nor its stockholders, could have got a writ to prohibit the appointment of a receiver without first objecting in the superior court to its want of jurisdiction. Such objection, as we have seen, was made. It would have been sufficient to have objected that there was no application by a creditor or stockholder for a receiver, and no grounds alleged for such appointment; but the defendant corporation or its stockholders went further; they showed affirmatively that there were no creditors, and that all the stockholders desired the statutory trustees to settle the business of the corporation. They showed everything, in short, necessary to sustain their objection to the jurisdiction, and the opinion of the superior judge, *supra*, shows that their objections were strenuously urged and maturely considered. But what happened? After holding the matter under advisement for nearly a month, the respondent filed an opinion overruling the objections to his jurisdiction, and on the same day appointed a receiver, who on the same day qualified by taking the oath and filing his bond, procured an order approving his bond and confirming his powers, and actually — according to his own views — had possession of the vast property in controversy before the agent of the petitioners or their attorneys had any notice that their objections to the jurisdiction had been overruled. If such proceedings, conducted with such precipitate haste, can deprive the injured party of a remedy to which he is clearly entitled, then our law must be lame and impotent indeed.

But, happily, there is no foundation for the claim that an inferior court can, by mere haste and precipitancy, defeat the appropriate remedy for excesses of jurisdiction, at least in a case where it may be intercepted before its action is fully completed.

We are referred by counsel for respondent to a number of decisions of this court which are supposed to sustain their position on this point, but we do not find them at all in conflict with our views. Not one of them related to a case like this, and the general expressions to be found in the opinions

must, of course, be construed with reference to the facts of the particular case.

In *Hull v. Superior Court*, 63 Cal. 179, it was said that prohibition was not available to prevent the acts of a *de facto* ministerial officer, nor to prevent judicial acts already done.

The attempt in that case was to try the right to the office of sheriff. It was decided that this could not be done by prohibition; and what was said as to judicial acts already done had reference to the act of the superior judge recognizing the official character of the incumbent *de facto* of the office. Such acts must of necessity have been complete and ended past remedy.

In *More v. Superior Court*, 64 Cal. 345, it was held that the order of the superior court was not in excess of its jurisdiction, which was a sufficient reason for dismissing the proceeding, and it was in fact dismissed on that ground. What else was said in the opinion seems to have been in answer to a claim that the court had power to undo something that the receiver had done in excess of his authority. It ought not to be necessary to point out the distinction between that case and this. Here the order of the court is in excess of its jurisdiction, and the court, through its receiver, is doing and continuing to do, and threatening to complete, a series of proceedings which are a wrong and injury to the petitioners. In that case the order of the court was regular and valid. The court, to which the writ alone runs, had done nothing in excess of its jurisdiction, but the receiver, as was claimed, was doing or had done something which, as a receiver, he had no right to do. Of course the writ of prohibition was not the proper remedy in such a case.

The case of *Coker v. Superior Court*, 58 Cal. 177, does not touch the point, the decision being that the superior court had not exceeded its jurisdiction.

Other decisions, cited from the reports of other states, are equally inapplicable, but we have no time to review them.

We will, however, refer to the language quoted by counsel from High on Extraordinary Legal Remedies, section 766. He quotes the following: "Another distinguishing feature of the writ is, that it is a preventive rather than a corrective remedy, and issues only to prevent the commission of a future act, and not to undo an act already performed." To show what this means, he should have quoted what follows, in the next sentence: "Where, therefore, the proceedings which it is

sought to prohibit has already been disposed of by the court, and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie," etc.

This is really the whole extent of the rule. Where the proceeding in the lower court has ended, and the court has nothing further to do in pursuance or in completion of its order, or where it has dismissed the proceeding, prohibition is no remedy; but where anything remains to be done by the court, prohibition not only prevents what remains to be done, but gives complete relief by undoing what has been done: See forms of writs cited in 2 Chitty's Practice, 354, 355; *Ex parte Morgan Smith*, 23 Ala., N. S., 94; *Jones v. Owen*, 5 Dowl. & L. 669; *Marsden v. Wardle*, 3 El. & B. 659, and cases therein cited; *Sargeant v. Dale*, 1. R. 2 Q. B. 558. In *White v. Field*, 12 Com. B., N. S., 383, the court says (p. 412): "The writs in the register and elsewhere which conclude with a *mandamus* to the court Christian to recall an excommunication already erroneously fulminated, or a sequestration wrongly issued, are all, as to the prohibitory part, peremptory, and the *mandamus* to revoke the unauthorized proceedings only accessory to the peremptory prohibition and necessary to give it effect."

Here is a clear indication of the extent of the remedial office of the writ. It is primarily and principally preventive,—its office is to arrest proceedings; but when a case arises in which there are proceedings to be stayed or prevented, it will also annul such prior proceedings as may be necessary to make the remedy complete. The principle is that which prevails in equity. When there is jurisdiction, the court will afford complete relief. A party will not be compelled to resort to more than one proceeding or more than one court for redress of one injury: See also *French v. Noel*, 22 Gratt. 454. Many other cases are cited in the brief of counsel for petitioners to this point, and might be cited here, but it is unnecessary.

In the nature of things it must be true that when a receiver has got possession of property under a void commission, and the future acts of the court, i. e., the sale of the property and distribution of its proceeds, are arrested by prohibition, the writ will also require a restoration of the property to the petitioner; for otherwise prohibition would be worse than no remedy at all. It would prevent the owner from getting either the property or its proceeds. The receiver would continue to hold it discharged of the duty of accounting for it.

We will next consider the objection that prohibition will not lie because the petitioners had other plain, speedy, and adequate remedies in due course of law.

It is suggested that they might have moved the court below to withdraw its order for a receiver. But suppose the court insisted that everything should be absolutely given over to the possession of the receiver before he would listen to any application for a revocation or modification of his order, can it be said that a motion only to be considered on such conditions afforded an adequate remedy, or any remedy? And suppose the motion had been heard and denied, would that have helped them? After all it would have been necessary to appeal to some other court for relief. But surely counsel can scarcely be serious in contending that because a party can move a court to set aside an invalid order, therefore he cannot have a writ of prohibition; for if this were so, there never could be a writ of prohibition; such a motion would always be possible. The most that can be claimed is, that an application should be made to the lower court before moving for the writ. But this is another point to which we shall refer hereafter.

It is also suggested that the petitioners might have bowed to the authority of the receiver, given him possession of everything, and then obtained leave from the superior court to sue him in ejectment, or that they might have sued him in forcible entry.

It is true, the petitioners might have done this, but the remedy would have been neither speedy nor adequate. They had the right not merely to get their property back after a long and expensive litigation; they had a right to keep it. The wrong with which they were threatened when they applied for the writ, and when the writ issued, was the deprivation of the possession and the use of their property. To give the property up in the hope of being allowed by the superior court to sue for it and recover it after years of litigation was neither an adequate nor a speedy remedy. It would be as reasonable to say that an injunction should never issue to restrain a threatened injury, because the party injured may always have his action for damages.

But there is a distinction affecting this question which counsel seem to have wholly overlooked, —a distinction, that is to say, between acts of the receiver and acts of the court. When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as

he acts in pursuance of the orders of the court he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case, the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted, just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or if the title is in doubt, permit an action to be brought against him to try the title.

But when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court; the wrong is in the order of the court, not in the receiver's transgression of the order. In such case it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrong-doer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court, and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force, in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses.

But it is said that the order appointing the receiver was appealable, and therefore prohibition will not lie.

The statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction.

In *Childs v. Edmunds*, 10 Pac. Rep. 130, Cal., March, 1886, the petitioner had a right to appeal, and by his appeal he could stay the enforcement of the writ of assistance. More than this, it does not appear that any excess of jurisdiction had been committed in ordering the writ of assistance; and if so, appeal was the only remedy.

In *Mancello v. Bellrude*, 11 Pac. Rep. 501, Cal., June, 1886, and *Levy v. Wilson*, 69 Cal. 105, appeal was a complete and adequate remedy. In *Clark v. Superior Court*, 55 Cal. 199, and *Wreden v. Superior Court*, 55 Cal. 504, there was no excess of jurisdiction, and appeal was the only remedy. The same is true of the case of *Powelson v. Lockwood*, 82 Cal. 613.

The difference between this case and all those referred to is, that here an appeal would have afforded no remedy for the wrong with which the petitioners were threatened. By means of an appeal, at the end of about a year and a half, in the ordinary course, they could have procured a reversal of the order,—if, indeed, as strangers to the action in which it was made, they had any right to appeal,—but in the mean time they would have been irreparably damaged, unless upon the taking of the appeal the court would have suspended action under the order. But the court had already decided that no appeal could by possibility stay the appointment of a receiver and the seizure of the property by him. And so it would have been necessary to make a motion to suspend the order, and for a restoration of the property or a withdrawal of the receiver, wait until that order was overruled, and a bill of exceptions settled, and take another appeal from that order, as was done in *Lee Chuck v. Quan Wo Chung Co.*, 81 Cal. 222; or some other proceeding would have been necessary, involving ruinous delay.

For in the mean time the receiver would have gained complete possession of the refinery and other property; the refinery would have been closed, stock injured, contracts broken, employees discharged or kept in idleness, and every possible damage inflicted, without any security for the loss.

In such a case there was no adequate remedy, except by a proceeding which would prevent the receiver from taking possession of the property, and the writ of prohibition was, as has been shown, the appropriate remedy for that purpose. It has, it is true, been in great measure shorn of its efficacy by the precipitate haste of the receiver in proceeding under the order of the superior court, but the propriety of the course

pursued by the petitioners is to be judged, not by the consequences of what the receiver has done, but by the case upon which their petition was founded and our writ awarded.

The fact, therefore, if it be a fact, that the petitioners could have appealed from the order appointing the receiver, does not preclude them from having the writ of prohibition.

The case of *Haile v. Superior Court*, 78 Cal. 418, so much relied on by counsel at the oral argument, and cited again with emphasis in the briefs since filed, is, as we pointed out at the hearing, radically different from this case. There the order of the superior court was in no respect in excess of its jurisdiction. The receiver was regularly appointed in a proper case to take charge of the estate of a voluntary insolvent. He was not directed to take any specific property; the court had decided nothing against the claims of the petitioner, and was not assuming to decide anything with respect to his claims. The court, in short, had done nothing which could have been prohibited. But it was feared by the petitioner that the receiver might sell property previously assigned to him by the insolvent, and he wanted such action by the receiver restrained. He feared, in other words, that the receiver would exceed his authority and commit a trespass. We said, in vacating the alternative writ, that if the receiver had taken any property belonging to the petitioner under the order of the superior court, he had done so without authority, and was a mere trespasser, for which plaintiff had a remedy by action, and that he could not resort to the extraordinary remedy of prohibition.

What bearing this decision can be supposed to have upon a case where the order of the court is in excess of its jurisdiction, and where the object of the proceeding is primarily to restrain the court in its judicial action, and only indirectly affects the receiver, who has done nothing except what the court has commanded him to do, we have thus far failed to comprehend. We have pointed out in another connection the reasons for allowing a summary remedy to arrest judicial action in excess of jurisdiction, and the difference between the situation of a person wronged by such action and one threatened by a private trespasser. In the one case the party threatened has a right to resist the trespass by force if necessary; in the other, though he may have the right to resist, it is against the policy of the law to encourage such resistance, and a summary remedy is given to arrest the proceeding.

It is next urged, in behalf of respondent, that prohibition will not lie to try title to property. Which means, in its application to this case, that the petitioners cannot be allowed to show, in this proceeding, that they are the owners of the refinery. But we think counsel have misapprehended the bearing of the proposition which they lay down, and to which we assent.

It is true, the title to the property cannot be tried in this proceeding, but what this means is, that when a court, by its order, has taken property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction, irrespective of the actual state of the title. Whether the party in possession really held the title or not, the order is void, because no man can be deprived of his property without due process of law. A court cannot take property from his possession without a hearing, and compel him to prove title, in order to regain it.

It is next suggested that the writ of prohibition does not issue *ex debito justitiæ*, but it is to be granted or withheld, in the sound discretion of the court, and that in this case it ought not to be allowed in favor of these petitioners, because they are members of the sugar trust, monopolists, and are the tempters who seduced the American Sugar Refinery into the combination.

There is no competent proof before us of these facts; but assuming them to be so, the law is not such as counsel claim it to be. A decision may be found here and there saying in a loose way that the issuance of the writ is in the discretion of the court, and a statement, in general terms, to the same effect, may be cited from text-writers, who merely echo the decisions, but it never was the law that a court having jurisdiction to issue the writ had any discretion to refuse it when demanded by the real party in interest bringing himself clearly within the law. If such an idea has obtained anywhere, it has been in consequence of a misunderstanding of the English cases.

In England the practice in prohibition was analogous to the practice in other actions at law. An original writ (of prohibition) issued for the purpose of securing an appearance, and after appearance the pleadings followed; that is, the plaintiff declared, the defendant pleaded or demurred, and so on. But there was this difference between the writ of prohibition and other original writs, that whereas the writs in ordi-

nary actions issued of course on application of the plaintiff, the writ of prohibition did not issue of course, but only upon affidavit showing grounds for its issuance.

Another difference was, that not only the party injuriously affected by the proceedings of the inferior court, but any subject of the king, was allowed to interfere to prevent an excess of jurisdiction, and in case of suit by a stranger to the proceeding to be stayed, the superior courts exercised a discretion in granting or withholding to writ, but never when the party affected was the plaintiff. This whole subject is reviewed exhaustively in the case of *Mayor of London v. Cox*, L. R. 2 H. L. 278, 280. The following quotation from an opinion of Lord Chief Justice Cockburn, therein cited (p. 280), shows what the law on this point is:—

"I entirely concur in the proposition that although the court will listen to a person who is a stranger, and who interferes to point out that some other court had exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that it not *ex debito justitiæ*, but a matter upon which the court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiæ*, if he suffers from the usurpation of jurisdiction by another court". *In re Foster*, 4 Best & S. 187.

In this state, it is always the party aggrieved who sues; and if he shows a case for the issuance of the writ, the court cannot refuse it on the ground that he is a bad man, and deserves the punishment he is threatened with, or upon any other consideration which appeals to the mere discretion of the judge.

We come finally to the proposition upon which counsel for respondent insists most strenuously, viz., that the jurisdiction of the court to grant a peremptory writ of prohibition depends absolutely upon the allegation and proof by petitioners that before filing their petition here they had pleaded to the jurisdiction of the superior court, and that their plea had been overruled.

To sustain this proposition they cite the decisions of this court, above referred to: *Chester v. Colby*, 52 Cal. 517, and *Southern Pac. R. R. Co. v. Superior Court*, 59 Cal. 476; and they cite a number of decisions from the courts of other states.

It is clear that the California cases do not support the contention of respondent. In each of them a party to the proceeding in the lower court was the petitioner for the writ, and

all that was held in the first case was, that an objection to the jurisdiction of the lower court having been taken by demurrer, and being undecided there, this court would not interfere by prohibition before that court had overruled the objection. In the second case, it was held that the party must in some form object to the want of jurisdiction of the lower court before the writ of prohibition would issue. In neither case was the failure to make such objection held to be jurisdictional, but the refusal to issue the writ was put upon the ground that prohibition is a prerogative writ, and consequently that the court had and ought to exercise the right to make its issuance subject to reasonable conditions, and that it was reasonable to give the lower court an opportunity to correct itself before calling the judge to answer here.

We have no doubt that both decisions are correct in all that they decided, and in all that was said in the opinions on this point. To the extent that its issuance may be made subject to reasonable conditions applicable equally to all cases and all suitors, the writ of prohibition is, no doubt, a "prerogative" writ, though it may be doubted if that is a correct term of description; for, in the same sense, all writs might be called prerogative writs. And we are satisfied that the rule of practice established by these decisions is a proper and wholesome rule, recommended by important considerations of expediency.

When a party has an opportunity of objecting in the lower court that it is proceeding or is asked to proceed in a matter without or in a manner exceeding its jurisdiction, he ought to make the objection there. It is only fair to the court that the objection should be brought to its attention in some proper form. If no objection is made, — the party having every opportunity to object, — the court may reasonably infer that no ground of objection exists, and not only is the court entitled to the advice and suggestions of the party with reference to objections apparent on the record, — there are many cases in which the ground of objection would not appear unless set forth by plea in some form. And it is to be presumed that any valid objection properly brought to the attention of the court would generally prevail, and that all necessity for a writ of prohibition would be obviated. Therefore, the interest of the public in preventing unnecessary litigation, as well as consideration for the judge of the lower court, demand that the objection should be made at the first opportunity.

These are the reasons of the rule, and they indicate its

scope and the extent of its application, as the authorities very fully show. We have not time to review the cases, other than those cited from the reports of this state, but we refer to the case of *Mayor of London v. Cox*, L. R. 2 H. L. 278, 280, in which the learning of the subject is exhausted. That was a case appealed from the court of exchequer to the exchequer chamber, and finally to the house of lords. Before deciding it, the lords requested the opinion of the justices of the queen's bench on two questions, the second being as follows: "Whether the garnishees in the lord mayor's court could maintain an action for a prohibition without having pleaded in the lord mayor's court." To which the justices unanimously responded that they could. This was in accordance with the unanimous decision both of the court of exchequer and exchequer chamber, which was accordingly affirmed in the house of lords. The answer of the justices, prepared by Justice Willes, contains a full review of all the cases, showing that even in England the subject had not been clearly understood, and that some inconsistent and erroneous decisions had been made. It is not surprising, therefore, that in some of the United States the same confusion has arisen, and that some cases have been erroneously decided, to the effect, for instance, that the issuance of the writ is in the discretion of the court, and that a formal plea to the jurisdiction of the lower court is an essential prerequisite to its issuance. Fortunately no such decisions have been made in this court, though in deciding *Chester v. Colby*, 52 Cal. 517, an Arkansas case is cited with approval which apparently does go to the extent claimed by respondent. But we are fully at liberty, without questioning the authority of any case decided in this court, to adopt the correct rule and doctrine as expounded and laid down in the case of *Mayor of London v. Cox*, L. R. 2 H. L. 278, 280.

Without going into the niceties of the subject, it may be said that the following propositions, applicable to this case, are fully supported by the decision in that case:—

1. If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition.

2. If the proceeding in the lower court is not on its face without the jurisdiction of such court, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form, in order to make the want of jurisdiction appear.

3. But this is not essential to the jurisdiction of the superior court to grant prohibition. It is only laches, which may or may not be excused, according to circumstances.

Accordingly, we find that frequently a failure to plead in the lower court was excused for the reason that it appeared that the plea would have been rejected if made. The whole question in fact was one of practice merely, not of jurisdiction, and the objection which most frequently prevailed to the granting of the writ was, not that the application came too early, but that it came too late.

The rule which we have adopted is founded upon the same considerations, and directed to the same end. Our jurisdiction is ample to arrest by prohibition any proceeding without or in excess of the jurisdiction of the superior court, but by statute we are forbidden to do so when there is a plain, speedy, and adequate remedy in ordinary course of law; and by the practice which we have adopted and prescribed for ourselves, we will not issue the writ until the objection to its want or excess of jurisdiction has in some form been made in and overruled by the lower court, the whole foundation of the rule being the respect and consideration due to the lower court, and the expediency of preventing unnecessary litigation.

Applying these principles to the present case, we find that the petitioners were not, in their character of purchasers of the specific property described in the order appointing the receiver, parties to the *quo warranto*, or the rule to show cause why the receiver should not be appointed, and in that character they had no opportunity to object until after Mr. Reddy appeared at the refinery armed with an order of court authorizing him to take it into his possession.

As stockholders of the corporation, however, it is contended, and may be conceded, that they were virtually defendants in the *quo warranto*, and parties affected by the rule to show cause.

But it clearly appears that in that character they made every objection that could be made to the order asked, which did not refer to any specific property. They filed an affidavit showing that there were no creditors of the corporation, and a certificate showing that all the stockholders had requested the directors to close up the business of the corporation. They also brought to the attention of the court the fact that an appeal from the judgment of forfeiture had been taken and perfected. All these objections went to the jurisdiction; they were all

argued, all maturely considered, and all overruled in a carefully prepared opinion in writing.

What more could possibly be necessary, in order to authorize us, under any rule prevailing anywhere, to examine and decide upon the objections so made and so overruled? Certainly nothing that has ever been decided by this court, and nothing in the reason of the rule.

Even as to the objections to the order, as made, upon grounds peculiarly affecting the petitioners as purchasers of the specific property therein described, they did everything which the reason of the rule requires.

It is objected that they did not file a formal plea, make a formal motion, and await a decision of the superior court before moving here. But what opportunity were they allowed to take these steps?

The first notice they had of the order empowering the receiver to take the property claimed by them was his appearance at the refinery demanding immediate possession, and asserting his authority and control. In the short respite of one night which was granted them, they prepared affidavits setting forth their claims upon which to base an application for such a stay as would enable them to move for a suspension or modification of the order. Their attorney sought the respondent at his chambers at the earliest possible moment, stated to him the substance of the affidavits, and the nature of his application. He also stated that there was a scramble for the possession of the refinery between the receiver and the agents and employees of the petitioners. Thereupon the respondent distinctly informed him that his application would not be considered unless full and complete possession of the property was first delivered to the receiver. To have yielded to this condition would have been to give up the whole controversy, and submit to the very wrong which it was their object to prevent. They were not bound, therefore, to move upon such terms, and being advised, and fully believing, — what the event proved to be a fact, — that the respondent and the receiver would proceed with all expedition to enforce the invalid order, they were justified in filing their petition without further delay.

It is unnecessary, in this view, to determine whether the affidavit of Mr. Mott was actually read to Judge Wallace or not, and we shall not attempt to reconcile the conflict in the testimony upon that point. In any event, it is certain that

our jurisdiction to issue a peremptory writ is complete, and equally certain that the respondent has no reason to complain that objections to his order were not submitted to his decision before this proceeding was instituted.

It is also unnecessary to enter into any detailed discussion of the testimony as to the extent or completeness of Mr. Reddy's possession at the time the writ was served. It is the time when the writ is ordered, not the time when it is served, that fixes the extent of our power to interfere with the proceeding in the lower court. But even this is immaterial in the case; for we have shown that, so long as property in the hands of a receiver remains subject to further judicial action which may be arrested by the prohibition, the remedy will be made complete by ordering its restoration.

So far, therefore, as the prohibition is concerned, it makes no difference if we assume that Mr. Reddy had complete possession at the time we ordered the alternative writ.

It is only with respect to the proceeding for contempt that the facts relating to the possession of the receiver are material.

In considering the question of contempt, it will be necessary to examine with some care the evidence on this point, and as this will necessarily occupy some time, and as it is important that the petitioners should have as speedy relief as possible, we will make that matter the subject of a separate opinion, to be filed at our earliest convenience. In the mean time an absolute and peremptory writ of prohibition will issue in accordance with the views herein expressed.

RECEIVERS — WHEN AND OVER WHAT APPOINTED. — As to when and under what circumstances the court may appoint a receiver over corporate property, see note to *Cortelyou v. Hathaway*, 64 Am. Dec. 483, 486.

CORPORATIONS — DISSOLUTION. — As to the effect of the dissolution of a corporation upon its property, see *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and cases cited in note.

RECEIVERS, APPOINTMENT OF — STATUTE. — Where a statute makes provisions for the mode of appointing receivers, the power of the court appointing a receiver is limited by such provisions, and it can only proceed in the manner therein provided: *Cohell v. Bank*, 119 N. Y. 409.

STATUTES — CONSTRUCTION. — A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers of that statute: *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819, and note as to the effect of the intention of the law-makers upon the construction of statutes.

CORPORATIONS — FORFEITURE OF FRANCHISE. — As to the causes for which, the mode of procedure by which, and persons or parties at whose instance,

forfeitures of corporate franchises may be declared, see extended note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179-202.

CORPORATIONS — DISSOLUTION. — Upon the dissolution of a corporation, its property, real and personal, becomes assets for the payment of creditors and for distribution among the stockholders: *State v. Bailey*, 16 Ind. 46; 79 Am. Dec. 405.

WRIT OF PROHIBITION, WHEN MAY ISSUE, to whom issued, and the effect of its issue: Extended note to *State v. Road Commissioners*, 12 Am. Dec. 604-609. Compare *Hayne v. Justice's Court*, 82 Cal. 284; 16 Am. St. Rep. 114, and note. The writ should issue only where ordinary remedies are inadequate to the ends of justice: *Martin v. Sloan*, 98 Mo. 252. The writ will lie to prevent a superior judge from proceeding against law: *Commonwealth v. Latham*, 85 Va. 632; or proceeding further in matters over which he has no jurisdiction: *Green v. Superior Court*, 78 Cal. 556; *Nelms v. Vaughan*, 84 Va. 696. But ordinarily the writ will not issue against an inferior court, where it appears that such court has jurisdiction, and there is an adequate remedy by appeal: *Murphy v. Superior Court*, 84 Cal. 592; *Thomas v. Justice's Court*, 80 Cal. 40; *State v. Justice's Court*, 41 La. Ann. 403; or otherwise: *Shinkle v. Covington*, 83 Ky. 420; *Halle v. Superior Court*, 78 Cal. 418; *State v. Southern Ry Co.*, 100 Mo. 59; *State v. McMartin*, 42 Minn. 30.

MUNRO v. PACIFIC COAST DREDGING AND RECLAMATION COMPANY.

[84 CALIFORNIA, 515.]

PLEADING.—THE RIGHT OF A PLAINTIFF TO SUE AS ADMINISTRATOR sufficiently appears from an averment in his complaint that he filed a petition for letters of administration at a time and in a court designated, and that thereafter such proceedings were had that the court, by an order duly given and made, appointed him sole administrator, and that he thereafter qualified as such, and letters of administration issued to him.

JURY TRIAL. — INSTRUCTION that if the jury found, from the evidence, that the defendant, through its agents, servants, and employees, fired and exploded a blast as charged by the plaintiff's complaint, and that it resulted in the death of the plaintiff's intestate, then that plaintiff is entitled to recover, is not erroneous, and does not remove from the jury the consideration of all questions except as to whether defendant fired the blast, if the complaint sets forth a careless and negligent explosion of the blast.

LIABILITY FOR EXPLODING A BLAST. — When injuries are inflicted by exploding, in a thickly settled part of a city, a blast of gunpowder, the parties causing such explosion are not relieved from liability by the fact that they employed careful and experienced men, and exercised the highest degree of care.

JURY TRIAL. — INSTRUCTIONS IGNORING THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE will not occasion a reversal, where there was no evidence of such negligence on the part of the person injured.

CONSTRUCTION OF STATUTES GIVING DAMAGES FOR DEATH. — The provision of the code of California that "when the death of a person, not being a

minor, is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," authorizes but one action to be brought; and when such action is brought, none other can be permitted, and though the action is by the personal representative of the decedent, all damages occasioned to his heirs may be recovered therein.

ACTION FOR CAUSING DEATH — DAMAGES.— In an action by an administrator of a decedent to recover damages for his death, resulting from the negligence of the defendant, the jury has a right to take into consideration the pecuniary losses suffered by his mother, if she is his heir at law.

DAMAGES FOR CAUSING DEATH OF A HUMAN BEING allowed by the statute of California to be recovered by his heirs or personal representative do not include sorrow, suffering, or mental anguish occasioned by such death. Where the decedent left a mother or wife, the jury, however, may take into consideration her loss of comfort, society, and protection.

DEATH — DAMAGES FOR CAUSING, TO WHOM BELONG.— The damages given by the code of California for negligently causing the death of a person are recoverable for the benefit of his heirs, and do not constitute any part of his estate.

T. C. Coogan and W. W. Foots, for the appellant.

James C. Cary and J. D. Sullivan, for the respondent.

THORNTON, J. This action is brought to recover damages for death caused by the negligent explosion by defendant of a blast in the city of San Francisco, whereby the plaintiff's intestate was killed.

The demurrer to the complaint was properly overruled. The allegations as to the appointment of Munro as administrator of the deceased, Stanton, were sufficient.

The court committed no error in its rulings on the admission of testimony.

The court gave, at the request of plaintiff, the following instruction to the jury:—

"If you find, from the evidence, that the defendant, through its agents, servants, and employees, fired and exploded the blast, as charged by the plaintiff's complaint, and that it resulted in the death of Michael Stanton, the plaintiff's intestate, then the plaintiff is entitled to recover such damages as, from the evidence and proofs, under all the circumstances of the case, you may deem to be just."

To the giving of this instruction the defendant excepted.

It is contended now, on behalf of defendant, that this direction was erroneous, because it removed from the jury the consideration of all the issues, except that the defendant fired and exploded the blast, and that it resulted in Stanton's death;

that there were other issues in the case, but by this instruction they were brushed aside.

We find no error in this instruction. The language in the first clause, that "the defendant, through its agents, servants, and employees, fired and exploded the blast," is qualified by the words "as charged in the plaintiff's complaint"; and the complaint set forth a careless and negligent explosion of the blast. In our judgment, the direction embraced all the material issues in the complaint, the finding on which was necessary to establish the cause of action against the defendant.

The giving of the following instruction by the court is likewise excepted to:—

"It is no defense or answer to an action of this character that defendant, in exploding the blast in question, used and employed skillful and experienced men, and in everything appertaining to blasting it used and exercised the highest degree of care; and I charge you that defendant is liable to damages for the death of said Michael Stanton if you find that his death resulted from the firing of the blast in question, even if it used the highest and utmost care and skill in firing and exploding it."

We perceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it.

It is said that the above instructions ignore the doctrine of contributory negligence. As there was no evidence of contributory negligence in the cause, the doctrine of such negligence was properly ignored.

The court also directed the jury as follows:—

"3. If your verdict shall be for the plaintiff, such damages may be given by you as, under all the circumstances of the case, may be just. And in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death, if you find that his mother is living. And the loss which the plaintiff is, in such a case as this, entitled to recover, is what the deceased would have probably earned and accumulated by his labor in his business or calling during the residue of his life, and which would have gone to the benefit of his mother, or heirs, or personal representatives, taking into consideration his age, health, habits of industry,

ability and disposition to labor, and the probability of his length of life.

"4. I further instruct you, if, from the evidence, you should find for the plaintiff, then the measure of damages is not alone the pecuniary loss and injury sustained by the mother in the loss of her son, as just explained, but in assessing the damages then, you may, in addition, take into consideration the sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of the deceased by reason of his death."

As no question is made on the remainder of this instruction, we do not insert it.

To the giving of these instructions, exceptions were reserved by defendant, and it is said, on behalf of defendant, that the court erred in giving them. Our attention is particularly directed to the following portion of instruction 3: "And that, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by the mother of Michael Stanton by his death"; and the following portion of instruction 4: "The sorrow, grief, and mental suffering occasioned by his death to his mother, together with the loss, if any, sustained by her in being deprived of the comfort, society, support, and protection of deceased by reason of his death."

Now, in regard to the above-quoted portion of instruction 3, it is argued the mother of Michael Stanton was not the party plaintiff; that the action was not brought by the heirs of the deceased, but by his personal representative; that this action is brought under section 377 of the Code of Civil Procedure. That section is in these words: —

"Sec. 377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just."

In connection with this section, our attention is called to the act of 1862 (Stats. 1862, p. 447), and it is said that section 3 of that act prescribed that the action should be brought by

the personal representative of the deceased alone, and prescribed the rule of damages in these words: "The jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, *and may take into consideration the pecuniary injury resulting from such death to the wife and next of kin of such deceased person,*" and that, when enacted in the code, the words in italics were omitted therefrom. The counsel for defendant proceeds to give the reason for this change in the enactment. The reason so given by counsel is, that the heirs were given the right to maintain the action, and hence its re-enactment was not necessary, because, in an action brought by them, as a matter of course, their pecuniary injuries should be taken into consideration.

We do not think that such is the proper construction of section 377. In our judgment, but one action is permitted, and that action may be brought either by the heirs of the deceased, or by his personal representatives; and when one action is brought, and the court has obtained jurisdiction of it, that is the only action which the statute permits; as, for instance, when the personal representative of the deceased brings an action to recover damages for the act or neglect causing death, if another action is afterward brought by the heirs of the deceased, the pendency of the prior action may be well pleaded in abatement of it; or if a judgment has been rendered in the first, such judgment may be well pleaded in bar of the second action.

The question made on the instruction above pointed out must primarily relate to the circumstances which may be given in evidence on the issue of damage, and on that point the statute is very broad and general in its terms. Such damage may be given as, under all the circumstances of the case, may be just, is the language of the statute. What these circumstances are may be a matter of difficulty in all cases to determine. It would be almost impossible to draw *a priori* the line which separates the circumstances which should be admitted from those which should be excluded. The exact line of inclusion and exclusion it would be hard to determine in advance of the circumstances of any particular case. Here the circumstances are defined in the instruction. As to the portion of instruction 3 objected to, we think that it was correct. The action is permitted by the statute to be maintained for the benefit of the heirs. Certainly the pecuniary loss which the heirs might sustain by the death is clearly one of the cir-

cumstances to be considered: *Chicago v. Major*, 18 Ill. 349; 68 Am. Dec. 553; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400; *Blake v. Midland R'y Co.*, 18 Q. B. 93. This is true under all the statutes giving an action on account of the death of a person, under 9 and 10 Victoria, chapter 93, known as Lord Campbell's act, as well as under the acts of the same character which have been enacted in the various states of the Union. The damage is to the heirs, and certainly the pecuniary loss to the heirs is one of the principal elements of damage. There was no error in the portion of instruction 3 assailed by defendant. -

As to the portion of instruction 4 above quoted, there is more difficulty. It has been held in an English case that the jury should not be allowed to take into consideration the mental sufferings or bereavement of the plaintiff for the loss of her husband: *Blake v. Midland R'y Co.*, 18 Q. B. 93. In this case the widow of the deceased as administratrix was the plaintiff. In the case cited, Justice Coleridge said:—

"The title of this act [referring to Lord Campbell's act] may be some guide to its meaning, and it is an act for compensating the families of persons killed, not for solacing their wounded feelings. Reliance was placed upon the first section, which states in what cases the newly given action may be maintained, although death has ensued, the argument being that the party injured, if he had recovered, would have been entitled to a *solatium*, and therefore so shall his representatives on his death. But it will be evident that this act does not transfer this right of action to his representative, but gives to the representative a totally new right of action on different principles. Section 2 enacts that 'in every such action the jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought. The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family.'

"In *Franklin v. Southeastern R'y Co.*, 3 Hurl. & N. 211, and in *Taulton v. Southeastern R'y Co.*, 4 Com. B., N. S., 296, suits were maintained on account of the death of sons for the benefit of parents, and damages allowed to be assessed on the basis of reasonable expectation on the part of the latter, or pecuniary benefit to be derived from the continuance of their sons' lives; but in the latter case the expenses of funeral and mourning

were disallowed, Mr. Justice Willes saying that 'the subject-matter of the statute is compensation for injury by reason of the relative not being alive.' " See also *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400; *Bradshaw v. Lancashire and Yorkshire R'y Co.*, L. R. 10 Com. P. 189; *Leggott v. Great Northern R'y Co.*, L. R. 1 Q. B. D. 599.

We agree with what is said in the opinion above quoted, that the action given by the statute is a new action, and not the transfer to the representative of the right of action which the deceased person would have had if he had survived the injury: *Blake v. Midland R'y Co.*, 18 Q. B. 93; *Pym v. Great Northern R'y Co.*, 2 Best & S. 759; *Read v. Great Eastern R'y Co.*, L. R. 3 Q. B. 555; *Safford v. Drew*, 3 Duer, 627; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400.

It may be observed that the language of the statute of this state (section 377 of the Code of Civil Procedure) is broader than the language of the English statute. The English statute may be found in 2 Redfield on Railways, 6th ed., 287. Under the words of the section, we are of opinion that the circumstances mentioned in it do not include the sorrow, grief, or mental suffering occasioned by the death of Michael Stanton to his mother.

The extent of the sorrow, grief, and mental suffering was not shown to the jury by any testimony. It was left to be inferred as a natural result of the death of the son. Whether such grief was overwhelming, or of a light and transient character, did not appear. The extent and character of the sorrow and grief were left to be conjectured or guessed at by the jury, with the right conceded to the jury of finding such grief and sorrow to be extreme, should they so elect. The opportunity to run into wild and excessive verdicts would be allowed them if the rule was as contended by plaintiff. The standard would be too vague and uncertain to be established as a rule of law for the admeasurement of the rights of parties. *Misera est servitus ubi jus est vagum aut incertum.*

In allowing the jury to take into consideration the loss of the comfort, society, and protection of deceased, we think we have gone far enough; but this we think should be allowed in the case of a wife, as in Beeson's case, or a mother.

We have found no case in which damages for sorrow, grief, and mental suffering are allowed under any of the statutes. We have examined the cases cited on behalf of the plaintiff, and they affirm no such proposition: See *Blake v. Midland*

Ry Co., 18 Q. B. 93; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400. In *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20, no such damages were allowed. The action in that case was by the widow of the deceased, as heir, and an instruction that in estimating damages the jury might take into consideration the pecuniary loss, and also the relations existing between the plaintiff and the deceased at the time of his death, and the injury sustained by her in the loss of his society, was approved: Page 33. In the case of *McKeever v. Market Street R. R. Co.*, 59 Cal. 294, the question did not arise: See pages 300, 301. In *Cook v. Clay Street H. R. R. Co.*, 60 Cal. 604, no such question arose or was decided. Nor did it arise in *Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 320. The sorrow, grief, and mental suffering of the mother, in our judgment, was too remote a circumstance to be taken into consideration in the estimate of damages, and was not allowable under our statute.

Judge Redfield, in the sixth edition of his work on railways, states: "There seems no doubt, according to the best-considered cases in this country, that the mental anguish which is the natural result of the injury may be taken into account in estimating damages, though not that it is a foundation for an action" (and the same statement is made in the third edition of the same work), and cites, to sustain his statement, *Canning v. Williamstown*, 1 Cush. 451, and *Morse v. Auburn etc. R. R. Co.*, 10 Barb. 623. In neither of these cases did the question arise. The first was an action by the party injured against a town, under a statute, to recover damages for an injury sustained by the plaintiff in consequence of a defect in a bridge in the town of Williamstown; the second case was an action brought by a passenger injured on the cars of the defendant company. Neither of the actions was to recover damages for the death of any person.

In *State v. Baltimore etc. R. R. Co.*, 24 Md. 85, 87 Am. Rep. 600, there is the same criticism of the remark of Judge Redfield, above quoted, in relation to damages caused by mental anguish: See pages 106, 107. And in this case from Maryland, which was an action for the benefit of the mother to recover damages for the death of her minor son, brought under the Maryland statute, it was held that the mental suffering of the mother resulting from the death of the child was a matter too vague to enter into the estimate of the damages merely compensatory.

In a note on page 288 of 2 Redfield on Railways, 6th edition, it is stated: "In a suit by a parent for the death of a child, recovery can be had only for the pecuniary injury, the services of the child, less cost of maintenance: *Pennsylvania R. R. Co. v. Lilly*, 73 Ind. 252; *St. Louis etc. R'y Co. v. Freeman*, 36 Ark. 41; *International etc. R. R. Co. v. Kindred*, 57 Tex. 491; *Rockford etc. R. R. Co. v. Delaney*, 82 Ill. 198; 25 Am. Rep. 308; see *Walters v. Chicago etc. R. R. Co.*, 41 Iowa, 71; including medical attendance, nursing, and expenses of burial, but not grief and loss of society, etc.: *Little Rock etc. R. R. Co. v. Barker*, 33 Ark. 350; 34 Am. Rep. 44; see *Barley v. Chicago etc. R. R. Co.*, 4 Biss. 430." This note is by the editor of the sixth edition, Mr. J. Kendrick Kinney.

We are of opinion that the court erred in including in the instruction the words "sorrow, grief, and mental suffering occasioned by the death of the son to his mother." In thus directing the jury, the court fell into an error. In our opinion, the damage should be confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support, and protection of deceased.

The court did not err in refusing the requests of defendant Nos. 1, 2, 3, 4, and 7. All of these instructions, under the facts of the case, would have been misleading. The evidence clearly showed both a wrongful act and neglect on the part of the defendant. It is a wrongful act to explode a blast of powder in a thickly settled portion of a city, as was done in this case. The uncontradicted testimony showed a clear case of explosion in the city, where many persons were living, and where such an explosion could not take place without strong probability of its injuring some one.

The defendant requested the court to instruct the jury as follows:—

"The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased."

The court refused to give this instruction as requested, but modified the same so as to read as follows:—

"The jury have no right to give exemplary or vindictive damages, but are confined to the actual pecuniary damage suffered by the estate of Michael Stanton, deceased; but in this connection I charge you that the law also permits a jury to make allowance for such a sum as may seem fair and just

for sorrow, suffering, and mental anguish occasioned to her by the death."

To the refusal of the court to give the instruction as requested, and in giving the modified instruction, the defendant excepted.

In refusing the request as made, the court committed no error of which the defendant can complain; but in giving it as modified, it did fall into an error, as has been shown above.

In relation to the seventh request of defendant, we remark that it related to a matter entirely immaterial in this case. The damages recovered are for the benefit of the heir or heirs, and do not constitute any part of the estate of the deceased: *Leggott v. Great Northern R'y Co.*, L. R. 1 Q. B. D. 599; *Chicago etc. R. R. Co. v. Morris*, 26 Ill. 400. The action is a new one given by the statute, and the damages recovered are, as said above, for the benefit of the heirs. Clearly, they can be no part of the assets of the deceased.

For the errors above pointed out, the judgment is reversed, and the cause remanded for a new trial.

ELEMENTS AND MEASURE OF DAMAGES IN ACTIONS FOR CAUSING THE DEATH OF HUMAN BEINGS: See extended note to *Louisville etc. R'y Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383.

AM. ST. REP., VOL. XVIII.—17

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

FOOT v. CARD.

[58 CONNECTICUT, 1.]

ACTION BY WIFE FOR ALIENATION OF HER HUSBAND'S AFFECTIONS BY ANOTHER WOMAN. — A wife may, in her own name, and without joining her husband as plaintiff, maintain an action against a woman who has alienated from her the affections and deprived her of the society of her husband; and her right of recovery is not affected by the fact that she and her husband are still living together. The wife's right to the conjugal affection and society of her husband is the same as his right to hers, in kind, degree, and value, and damages for injury to this right must be given to her solely.

ACTION for the alienation by the defendant of the affections of the plaintiff's husband. The opinion states the case.

C. S. Hamilton, for the defendant.

C. H. Fowler, for the plaintiff.

PARDEE, J. The plaintiff alleges that in the year 1872 she was living happily with and in the enjoyment of the conjugal affection and society of her husband, Enos Foot; that in that year the defendant, by her arts, blandishments, and persuasion, induced the said Enos Foot to begin, and from thence hitherto to continue, an adulterous intercourse with her; and that she thereby alienated from the plaintiff his conjugal affection, induced him to deny to her his conjugal society, and persuaded him to abandon her. She asks damages for these injuries.

The defendant pleads in abatement that the plaintiff and her husband are still living together, and that he should have been made co-plaintiff. The plaintiff, demurring to this plea,

admits, for the purpose of the question before us, that she is still living with her husband.

For further defense, the defendant demurs to the complaint as follows:—

“1. The matters and allegations contained in the plaintiff’s complaint are insufficient in the law to constitute any cause of action against the defendant.

“2. Because it is alleged in said complaint and appears therefrom that the plaintiff is a married woman, the wife of one Enos Foot, and has been the wife of said Enos ever since the year 1872, and for many years previous thereto, and as such married woman she cannot, either alone, or jointly with said Enos, her husband, maintain this action; nor can she, as such married woman, maintain any action for any of the supposed causes of action set forth in the complaint; nor can she, as such married woman, recover any damages against this defendant for any of the acts alleged to have been done in the complaint, or for the money so alleged to have been expended as therein set forth; nor has she, as such wife, any claim or cause of action against the defendant for any of the alleged acts set forth in the complaint.

“3. The relation of husband and wife does not give the plaintiff any cause of action at law for any of the alleged acts set forth in the complaint.

“4. The plaintiff has no right, title, or interest in the supposed causes of action set forth in the complaint.

“5. The alleged acts set forth in the complaint could only have been done by the voluntary assistance and co-operation of the said Enos Foot; and for his immoral conduct the defendant is not liable to the plaintiff.

“6. No legal cause of action could accrue from the facts set forth in the complaint, because it appears that the said Enos, the plaintiff’s said husband, was equally guilty with the defendant in the doing of the alleged acts.

“7. The plaintiff alone cannot maintain this action, but the said Enos is a necessary party to this action, if any cause of action exists.

“8. It does not appear, from said complaint, that the supposed wrongs and injuries which the plaintiff is said to have suffered resulted from the acts of the defendant, but it does appear that the same, if any there are, resulted directly from the voluntary, immoral, and adulterous conduct of the said Enos Foot.

“9. No action for criminal conversation is, at common law,

maintainable by a married woman against another woman, and it is not alleged and does not appear that this pretended action is founded upon any statute authorizing it; and there is in fact no statute authorizing it."

For the sole purpose of testing the sufficiency of the pleadings, the defendant admits, by her demurrer, that from 1872 to this present she has alienated from the plaintiff the conjugal affection of her husband, induced him to withhold from her his conjugal society, and herself has since lived in continual adultery with him. She denies, however, that the law has any form or mode of redress for this wrong. The case is reserved for the advice of this court as to the judgment to be rendered.

So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him.

Her right being the same as his, in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time, courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages.

In 3 Blackstone's Commentaries, 143, the reason for such denial is thus stated: "The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; therefore the inferior can suffer no loss or injury."

Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason; and the right, the injury, and the consequent damage being admitted, then comes into operation

another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority.

In *Lynch v. Knight*, 9 H. L. Cas. 589, the wife, with whom the husband was joined for conformity, complained that the defendant, a man, had alienated from her the conjugal affection of her husband, and deprived her of his conjugal society by falsely asserting to him that she had been guilty of unchaste conduct, and asked damages. The defendant had judgment, for the reason that the court was of opinion that the statement by the defendant to the husband did not, as a fact, occasion the alienation of affection and consequent separation complained of. In dismissing the case for this reason, the lord chancellor said: "Although this is a case of first impression, if it can be shown that there is presented to us a case of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. . . . The loss of conjugal society is not a pecuniary loss, but I think it may be a loss which the law may recognize to the wife as well as to the husband." Lord Cranworth said: "In the view I take of this case, I do not feel called upon to express a decided opinion on this point. I believe your lordships are not all agreed on it; and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend [the lord chancellor] was correct."

Wherever there is a valuable right, and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation. A technicality must not be permitted to work a denial of justice. The defendant has no possible interest in requiring the husband to be co-plaintiff, other than that she should have security for her costs in this suit, and be protected from a second judgment upon the same cause of action in his name. As she is in no danger of a second judgment, and can compel the plaintiff to give security for costs, it is simply an empty technicality which she here interposes. There are good reasons for the rule that the hus-

band should join in a complaint for damages resulting from an injury to the person, property, reputation, or feelings of the wife in every case other than that before us. Whenever in any of these she suffers, presumably he suffers; he has a direct pecuniary interest in the result; and the defendant is entitled to protection from a second judgment. But in the case before us, it is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society to her, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which, from the nature of the case, it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself or for his wife. To ask in his name would be to plant the seeds of death in the cause at the outset, and the law does not compel those who have suffered wrong so to ask for redress as to insure denial.

In a case of this kind the wife can only ask for damages by and for herself; the law cannot make redress otherwise than to her solely, apart from all others, especially apart from her husband. For no theory of the law as to the merger of the rights of the wife in those of the husband could include her right to his conjugal affection and society. Although all other debts and rights to her might go to him, there yet remained this particular debt from him to her absolutely alone and beyond the reach of the law of merger. So long as she on her part kept the marriage contract, no interest in this right can be taken from her; the husband cannot acquire any interest in it; she cannot transfer any.

Of legal necessity, therefore, damages for injury to this right must be to her solely. If the law should permit the husband to share therein, it would be, to the extent of such share, to deny justice. This the law may not do. Moreover, even if it be so that upon the recovery of damages by the wife for this injury to her sole right the law would give to the husband the custody thereof as her trustee, that would not be a sufficient answer to the action in its present form.

It is the contention of the defendant that the admission by the plaintiff that she and her husband are still living together is an admission that she now has and enjoys all that the marriage contract can, or intended to, secure to her; and that she has neither in law nor in fact suffered any injury. But this admission is to be considered in the light of that made by the

defendant, namely, that she has, during the last fifteen years, lived in continual adulterous intercourse with the husband,—an intercourse procured by her influence over him. Upon this admission it becomes certain that whatever may have been the measure or quality of the remnant of conjugal affection and society permitted to the plaintiff by the defendant as a matter of fact, and of law as well, the plaintiff has been deprived of the conjugal affection and society which the marriage contract entitled her to enjoy and required her husband to give; and that a valuable right, absolutely sole in her, and incapable of division, has been injured.

It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of, her right to redress is absolute; it cannot be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past. Upon the pleadings there is a valuable right in the wife solely, and an injury thereto for which damages must be given to her solely, notwithstanding the fact that she is living with her husband; therefore the law cannot refuse its assistance. The rules of law which the defendant invokes for her protection are not applicable to the case.

The superior court is advised that the complaint is sufficient, and that the plea in abatement is insufficient.

HUSBAND AND WIFE — ALIENATION OF HUSBAND'S AFFECTIONS. — As to the action maintainable by a wife to recover damages for the alienation of her husband's affections, see note to *Shaddock v. Clifton*, 94 Am. Dec. 593, 594. Compare *Des v. Roe*, 82 Me. 503; 17 Am. St. Rep. 499, and note.

WALSH v. RAYMOND.

[58 CONNECTICUT, 251.]

COUNSEL FEE OF ATTORNEY FOR RECEIVER — LIABILITY OF RECEIVER OF. —

When a receiver employs counsel, the court will determine the amount to be allowed them as compensation for their services to the receiver. And if a receiver employs an attorney, and pays him a certain amount for his services, and inserts that amount in his account, upon the filing of which he notifies the attorney to be present at the settlement of the account and be heard as to the amount to be allowed to him for his services, and if the attorney attends and is heard on the matter, but the court refuses to allow any more than the amount paid by the receiver, the attorney is bound by this adjudication, and cannot afterwards maintain an action to recover anything more from the receiver.

ACTION for legal services. The opinion states the case.

H. B. Scott, for the appellant.

J. B. Hurlbutt, for the appellee.

J. M. HALL, J. The defendant in this action was appointed a receiver of a copartnership by the superior court for Fairfield County, pursuant to the provisions of section 1816 of the General Statutes.

The finding shows that, "upon the application of the plaintiff to the defendant, the plaintiff was employed by the defendant as such receiver to act as his attorney in the settlement of said estate, and the plaintiff acted in that capacity during a portion of the time that the estate was in the course of settlement." The bill of particulars filed in the case shows that the plaintiff's claim is wholly for services rendered the defendant as such receiver. A difference of opinion arose between the defendant and the plaintiff as to the value of the plaintiff's services rendered the defendant as receiver, which resulted in the defendant's paying the plaintiff the sum of seventy-five dollars, which the plaintiff credited on his account. For the purpose of adjusting this claim, and relieving himself of further liability thereon, the defendant, when he came to settle his final account as receiver, notified the plaintiff to be present at the hearing upon his account in the superior court, to make objections, if any he had, to the allowance of the sum of seventy-five dollars which the defendant had credited himself in his account as paid to the plaintiff for the services as his counsel while he was acting as receiver.

The plaintiff appeared in court according to the notice, objected to the settlement of the account, and claimed that

a larger sum should be allowed him for the services he had rendered to the receiver during the settlement of the estate. The court, after hearing both parties, declined to make any further allowance to the plaintiff, accepted the final account of the receiver, and discharged him from his trust. No appeal was taken from such action of the court. The defendant thereupon paid out all the funds in his hands belonging to the estate in accordance with the orders of the court. Thereafter the plaintiff brought this suit against the defendant to recover a balance claimed to be due him for his services rendered to the defendant while acting as such receiver, in excess of the sum allowed him upon the final settlement of the receiver's account.

The defendant claimed, in his answer to the suit in the court of common pleas, that the action and decision of the superior court in allowing the plaintiff the sum of seventy-five dollars, and refusing to allow him more, after a hearing, was a bar to the plaintiff's action, and that he was not personally liable for such services. The court below sustained the defendant's claim. The plaintiff appeals for error in such ruling of the court. We are of opinion, however, that a brief consideration of the duties and powers of a receiver, the nature of the office itself, and the relations of a receiver to the court appointing him will abundantly justify the decision of the lower court.

A receiver is uniformly regarded as an officer of the court. He is the servant to whom the court intrusts the property in *custodia legis*, of which the court itself is the guardian. He is regarded as the executive officer of a court of chancery, in much the same sense as a sheriff is the executive officer of a court at law, and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment: High on Receivers, sec. 2. Baldwin, J., in giving the opinion of the court in *Beverley v. Brooke*, 4 Gratt. 208, says: "The receiver is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character as receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how or where or to whom the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection."

It is evident that a receiver must, in the absence of statutory authority, derive his powers largely from the established practice of courts of equity, and in this respect, as well as his relations to the court appointing him, and the consequent restriction upon his powers, a receiver occupies a somewhat different position from that of an executor or administrator. Strictly, a receiver has no right to incur any liability, or in any way hazard the fund in his custody, without the consent of the court. He has no power to commence or defend suits without such consent. It has been held, also, that courts will not allow a receiver any payments made to counsel for services when the employment of such counsel has not been authorized by the court: *Corey v. Long*, 43 How. Pr. 504.

In this case no question is made as to the employment of counsel by the receiver, and the court has approved of the necessity and propriety of such action of the receiver. But when such counsel are employed with the approval of the court, all the authorities agree in holding that the court will pass upon the amount to be allowed them for their services to the receiver. The authority several times cited on the plaintiff's brief clearly sustains this doctrine. "As a general proposition it may be said that a receiver may retain counsel without leave of the court, and that the assets in his hands are liable for their fees, which first, however, must be allowed by the court": *Beach on Receivers*, sec. 751.

We are satisfied that this rule as to compensation of counsel prevails in both the English and American courts, and that it is the universal practice of courts of equity to compel claimants upon the fund to present their claims before the court in charge of the fund, and that where so presented and finally passed upon, such claims are *res adjudicatæ* so far as the receiver is concerned, and his personal liability thereon ceases.

We believe such a rule to be a salutary one, and well calculated to prevent abuses, and protect receivers in the discharge of their duties. The nature of the duties imposed by the office demands that the court protect its own officer while acting strictly under the orders of the court. This courts of equity constantly do, in forbidding the bringing of suits against receivers without the consent of the court. Such consent will not be granted where the receiver has kept clearly within the scope of his authority, and acted wholly under the direction of the court. The following observations of the court in the case of *De Groot v. Jay*, 30 Barb. 484, are peculiarly applicable to

the case under consideration: "The receiver is an officer of the court, and by the well-settled practice, permission of the court was necessary to warrant an action against him. This rule is essential for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. It is a contempt of the court to sue a receiver without such permission. In most cases of claims against a receiver, or the fund or property in his hands, the remedy by special motion is adequate. Any persons having such a claim may resort to this summary remedy. The fund or property being held by the court, by its receiver, in trust for those entitled to it, or to be paid out of it, the court may administer justice to claimants without suit, upon special application. In the present case, all the relief sought to which the plaintiff is entitled might be obtained in that mode. And that mode is commended by considerations of economy as well as expedition."

The defendant in this action appears to have followed the established practice in regard to the settlement of the fees of counsel employed by receivers. The court, having control of the whole matter and conversant with all the details of the service rendered by attorneys in such cases, is exceptionally well equipped to pass upon the value of services of this character. We cannot conceive that any attorney at law, whose every act must be with full knowledge that he is acting for an officer of the court, will complain that in accepting employment for a receiver he is held to do so with the understanding that his compensation will depend upon the amount that may be allowed him therefor by the court upon the final accounting of the receiver. Any other rule would subject the receiver to expensive litigation after his final accounting and discharge from his trust by the court. We do not mean, however, to be understood as holding that a receiver, while acting as such, cannot make himself personally liable upon his contracts, or otherwise, but simply that he will be protected so long as he acts strictly under the orders of the court appointing him.

The defendant in this action complied with all the orders of the court, and the court accepted and approved his account after passing upon and disallowing the claim of the plaintiff. We are compelled to hold that this action of the court barred the plaintiff from any further proceedings against the defendant on account of said claim.

There is no error in the judgment appealed from.

RECEIVERS.—The general rule is, that a receiver cannot pay out money except upon the order of the court: *Adams v. Woods*, 15 Cal. 206.

RECEIVERS.—The compensation to be allowed a receiver's counsel is discretionary with the court from which the receiver derived his authority: *Stuart v. Bouhears*, 133 U. S. 78.

GATES v. STEELE.

[66 CONNECTICUT, 316.]

JUDGMENT, COLLECTION OF, WILL BE ENJOINED WHEN.—The voluntary acceptance by a creditor, after suit brought, of a sum of money less than the amount of his claim, in full settlement of the indebtedness and of the action, discharges both the debt and the costs, and his receipt in full may be pleaded in bar to the further maintenance of the suit; and if a judgment by default be afterwards taken against the debtor, the judgment so taken will amount to a fraud upon him, and its collection will be perpetually enjoined. The debtor's failure, under such circumstances, to appear and plead the receipt is not laches.

SUIT for injunction. The opinion states the case.

E. S. Wescott, for the appellants.

W. H. Pierce, for the appellee.

THAYER, J. The defendants appeal from a judgment of the district court of Waterbury granting a perpetual injunction to restrain them from making use of a judgment which they have obtained against the plaintiff. The questions raised by the appeal are presented by the defendants' demurrer to the complaint.

The plaintiff, who resides in Waterbury, was sued upon a small claim by writ in favor of the defendant Steele, returnable before a justice of the peace in Hartford. Before the return day of the writ, the plaintiff paid Steele twenty dollars, in full for all claims and indebtedness and in full settlement of the action, and took from him a receipt in full. Upon the return day, Wescott, the other defendant in the present suit, who as Steele's attorney had brought the suit and had charge of it, took judgment by default against the plaintiff for the full amount of the original claim, with costs. These facts are substantially alleged in the complaint, and it is averred that the judgment was fraudulently obtained, with the design to oppress and extort money from the plaintiff.

The causes of demurrer, briefly stated, are, that the plaintiff did not appear and plead his receipt in full in bar of the action before the justice; that the alleged payment was not

a complete defense to that action; and that the facts which constitute the fraud relied upon are not sufficiently set forth in the complaint.

The plaintiff, after the payment to Steele, had a perfect defense to the action which had been brought against him. The voluntary acceptance of the money by Steele, in full settlement, operated to discharge both the debt and the costs: *Canfield v. Eleventh School District*, 19 Conn. 529; *Ayer v. Ashmead*, 31 Conn. 447; 83 Am. Dec. 154; *Buell v. Flower*, 39 Conn. 462; 12 Am. Rep. 414. The receipt in full could have been pleaded in bar to the further maintenance of the suit: *Beam v. Barnum*, 21 Conn. 200; *Aborn v. Rathbone*, 54 Conn. 444. But the plaintiff's failure to appear and plead the receipt, under the circumstances, was not laches. He was not bound to go to Hartford to answer to an action which he had fully settled. He was justified in believing that the defendants would take no unfair advantage of his absence. They knew the reason for that absence. Their conduct in taking judgment in a suit which they had settled amounts to a fraud upon the plaintiff: *Chambers v. Robbins*, 28 Conn. 552.

That the specific acts of fraud relied upon should be stated in the complaint is true. A mere allegation of fraud, without stating the facts upon which the fraud is predicated, is insufficient. But the facts alleged in this complaint show that the defendants have obtained an unrighteous judgment against the plaintiff, which it is against conscience to enforce. They show the means by which that judgment was obtained. And they show that it was fraudulently obtained, with the intent to use it to oppress and extort money from the plaintiff. The conduct of the attorney in the matter, so long as it is not repudiated by Steele, must be taken as equally his conduct. Upon demurrer, the matters thus alleged must be taken to be true. They are sufficient to entitle the plaintiff to the relief demanded in the complaint, and granted by the court below.

There is no error in the judgment appealed from.

ACCORD AND SATISFACTION. — A creditor's acceptance of a smaller sum in satisfaction of a debt, accompanied by the execution of a formal and absolute release, is valid and irrevocable: *Gordon v. Moore*, 44 Ark. 349; 51 Am. Rep. 606; *Boyd v. Moats*, 75 Iowa, 151. The payment and acceptance of a less sum than is actually due, in compromise of the whole debt, is a complete and valid discharge: *Koonce v. Russell*, 103 N. C. 179; *Duluth etc. Commerce v. Knowlton*, 42 Minn. 229; *Averill v. Wood*, 78 Mich. 343; *Holton v. Noble*, 83 Cal. 7.

LEAKE v. WATSON.

[58 CONNECTICUT, 332.]

LIABILITY OF BROKER SELLING STOCKS FOR TRUSTEE IN VIOLATION OF LATTER'S TRUST. — A testator by his will gave certain securities to a trustee for the benefit of his daughter N., the income to be paid to her for life, and the remainder to go to her heirs. The will provided that N. might receive one thousand dollars a year of the principal, but not in all to exceed one half of the principal. The trustee and N. used the trust property in stock speculations, the defendants acting as their brokers, receiving stocks from them, and charging a commission. The trust estate was lost in these speculations, and the plaintiff, who was appointed trustee in place of the former trustee, removed, brought suit to recover from the defendants the value of the trust property which they had received and sold, and it was held, — 1. So far as they sold the securities as mere agents, in good faith, without knowledge, actual or constructive, that other persons interested in the trust were being prejudiced, and had fully accounted, they were not liable. The trustee might rightfully sell for the purpose of reinvesting, or of paying N. such portions of the principal as she was entitled to, and the defendants might safely act as her agents for that purpose; but if, with the defendants' knowledge, the trustee sold for other purposes, in violation of the trust, they were liable, even though they sold as agents. 2. If the trustee sold the securities constituting the trust estate for the purpose of using the proceeds in stock speculations, or of permitting N. so to use them, it was a breach of trust in which the defendants participated, if they purchased, knowing the purpose. And if they were holding stocks on margins for the trustee and N., and received the trust estate as security, and subsequently sold it, using the avails to make good the losses, they were liable for the trust estate so received by them. 3. The trust, its terms, conditions, and limitations, having been matters of record, the defendants took the property with full knowledge that others besides the trustee and N. were interested in it, because, knowing that it was trust property, they were put upon inquiry, and the law imputed to them such knowledge as they would have obtained had they made inquiry. They were therefore liable for the trust property, if any, in their hands, and for the avails of that which they had disposed of, less the amount that had been used for the legitimate purposes of the trust. 4. So far as the question of notice to the defendants was concerned, it mattered not whether the gift over was valid or void; it was enough that there were possible parties who had an interest in the property besides the trustee and N.; and as that fact clearly appeared on the face of the will, the trust was neither unknown nor unsuspected. 5. The action of the probate court in distributing the property to trustees in trust for N. was not conclusive as to the parties interested in the estate. The distribution was in terms made under the will which gave her only a life estate. The court made no distribution of the remainder. 6. On the question of notice to the defendants, it mattered not that there might be doubt as to whom the reversioners were, there being no doubt or uncertainty as to the equities of the reversioners. 7. So far as the defendants were concerned, any property purchased by the trustees to take the place of that sold by them was trust property. 8. The plaintiff's right to recover did not depend upon N.'s interest in

the property. 9. The former trustee could not be held liable for the squandering of the estate by his successor, although notice of his resignation had not been given to the heirs.

ACTION brought by the plaintiff as trustee of certain estate for Georgiana Nichols under the will of her father, Charles Bulkley, to recover from the defendants the value of certain stocks and bonds belonging to the trust estate, which had been received and sold by them as brokers, with alleged knowledge that they were being disposed of in violation of the trust. The action was brought to the superior court in Fairfield County. The defendants in their answer averred their ignorance of the existence of the will; that the stocks and bonds were received by the defendant Watson as a broker in the regular course of business from said Georgiana Nichols and Elizabeth Bulkley, then trustee, with orders to sell them, and that he sold them in good faith, and accounted to them for the proceeds before he had any notice of the plaintiff's claim. Fenn, J., who heard the case, among other things, found: That Charles Bulkley, of Fairfield, died in 1875, leaving a will, by which, among other things, he bequeathed to trustees, to be held in trust, and the income and interest thereof to be paid over annually, or oftener, for the use and benefit of his daughter, Georgiana Nichols, wife of William B. Nichols, with remainder to her heirs forever; provided that she might, if she should deem it expedient and necessary, from time to time, take and receive portions of the principal, not exceeding in all one half thereof, and not to exceed the sum of one thousand dollars in any one year, such portion to be paid over by the trustees upon notice in writing so to do, and her receipt to be a sufficient voucher to them. The will appointed the testator's wife, Elizabeth Bulkley, and Oliver Bulkley, his nephew, executors and trustees, without bonds. The will was duly probated. On February 1, 1876, distribution of Mrs. Nichols's portion of the estate was made "to Elizabeth Bulkley and Oliver Bulkley, trustees for Georgiana Nichols." This portion consisted of stocks and bonds amounting in value to \$44,981.81. Oliver Bulkley took possession of all this property as trustee. On August 21, 1885, he rendered his account as trustee to the court of probate, which was accepted, and he was, upon his application, discharged from the trust. This account showed that \$17,480.58 of the trust property then in his hands was made up of new investments, the rest being the same that was described in the distribution. New certificates of the stocks had been taken

in 1876 in the names of the two trustees. Upon his resignation, new certificates were issued in the name of "Elizabeth Bulkley, trustee for Georgiana Nichols," which he delivered to Mrs. Bulkley. Between March 9, 1876, and January 30, 1885, Oliver Bulkley made ten annual payments of one thousand dollars each, from the principal, to Mrs. Nichols, which she accepted as payments of principal under the will. Georgiana Nichols was born in 1838, married in 1857, became single again in 1877, and has so remained. She has three daughters, the youngest, born in 1864, now the wife of Richard P. Leake, the plaintiff trustee, and one son, aged fifteen. The defendant Watson carries on business in Bridgeport under the name of T. L. Watson & Co., there being in fact no company, the business being his own exclusively. The defendant Smith is Watson's employee merely. The business is that of private bankers, brokers, and dealers in stocks. Smith was Watson's cashier, manager, and confidential agent in the conduct of the Bridgeport business, Watson being occupied mostly with his New York business. From September, 1885, down to the summer of 1887, both Mrs. Bulkley and Mrs. Nichols had stock accounts with Watson as a broker doing business under the name of T. L. Watson & Co., and their stock transactions with him in his Bridgeport office, mostly conducted through Smith acting for him, in buying or selling on margin or speculation, were frequent and numerous. In addition to accounts kept in their individual names, there was an account kept in the name of Elizabeth Bulkley, trustee for Georgiana Nichols, which was a mixed account, commenced by paying in some cash, with which stocks were bought as an investment. Then more stocks were bought, and the former were used as margin to float the latter. This was the only account of this kind on the defendant's books. All stocks on margin were held on condition that the defendants should have a right to dispose of them without notice whenever the margin was reduced below a stipulated per cent. Mrs. Nichols mainly directed these stock speculations, both on her own account and that of her mother, who was an aged lady apparently fully dominated by her. Mrs. Nichols had had a previous experience in stock speculations, and relied unduly upon her own judgment and sagacity. Her orders to the defendants were peremptory, and were complied with quite as fully as margins would allow. The defendants never induced or encouraged her to speculate. She needed no such inducement. On the

contrary, they in some moderate measure endeavored to dissuade and restrain her. Some of her speculations were fortunate, but the general result was total disaster, both to the trust fund, which was her only individual resource, and to her mother's private means. The whole of these transactions with the trust property were with her full knowledge and approval. The certificates transferred were signed by the trustee to correspond with the description in the certificate, and the signature to the power of transfer was generally witnessed by Mrs. Nichols and by Smith. The powers were signed and witnessed in blank when the certificates were left in pledge on margin or for disposition, and filled out whenever there was occasion to sell out the margin or otherwise dispose of them. Both the defendants at all times knew that the securities belonged to and stood in the name of "Elizabeth Bulkley, trustee for Georgiana Nichols"; but they did not know, nor did they inquire with regard to, or use any means whatever to ascertain, the origin, nature, terms, or limitations of the trust, and neither of them had actual as distinguished from constructive notice and knowledge of the existence of the will of Charles Bulkley, or the proceedings of the probate court in reference thereto. The business of T. L. Watson & Co. was large, yet the circumstance of having women customers as stock speculators was quite exceptional, though not without a precedent, in their business. There was no other such customer at the time these transactions took place. On November 10, 1887, the probate court removed Elizabeth Bulkley from the trust, and appointed plaintiff trustee in her place. The questions of law arising on the record, and the question as to what judgment or decree should be rendered, were reserved for the advice of this court.

C. R. Ingersoll and W. L. Bennett, for the plaintiff.

H. Stoddard and G. Stoddard, for the defendants.

CARPENTER, J. Counsel for the respective parties have argued this case upon distinct and widely different theories; for the defendants, on the theory that they were merely agents; for the plaintiff, on the theory that the defendants were purchasers or pledgees. Each party, in his chosen position, is strongly intrenched. Grant his premises, and his position is well-nigh impregnable; grant the premises of both, were it possible, and a decision of the case would be very

difficult. But both cannot be right. The defendants cannot be entitled to the immunities of agents and at the same time liable as purchasers.

Our first inquiry then is, Were they purchasers or agents? So far as they sold the securities as mere agents, in good faith, without knowledge, actual or constructive, that other persons interested in the trust were being prejudiced,—in other words, so long as they did not knowingly participate in a breach of the trust, and have fully accounted,—they are not liable. In that case they conveyed no title of their own, but only such title as the principal could convey. The principal and the purchasers were the contracting parties. For the purposes of reinvestment, and of paying Mrs. Nichols such portions of the principal as she might be entitled to, Mrs. Bulkley as trustee had a right to sell, and the defendants might safely act as her agents for that purpose. If she sold for other purposes, in violation of the trust, with the defendants' knowledge, even though they may have sold as agents, still we think they are liable.

If Mrs. Bulkley sold the trust estate for the purpose of using the proceeds in stock speculations, or of permitting Mrs. Nichols so to use them, it was a clear breach of trust. If the defendants were the purchasers, knowing the purpose, they participated in the breach of trust. If they were holding stocks or other securities on margins for Mrs. Bulkley or Mrs. Nichols, or both, and received the trust estate as security, and subsequently sold it, using the avails to make good the losses, their liability cannot be questioned.

So long as trust property improperly sold can be traced and identified, the holder taking it with knowledge, it remains trust property. When it is sold pursuant to the terms of the trust, or apparently so, and the purchaser takes it in good faith, he takes it freed from the trust. In this case the finding shows that most of the property passed from the trustee to the defendants as trust property, in gross violation of the trust, with the defendants' full knowledge. We say with the defendants' full knowledge, because the defendants, knowing that it was trust property, were put upon inquiry, and the law imputes to them such knowledge as they would have obtained had they made inquiry. The trust, its terms, conditions, and limitations, were matters of record. Inquiry, properly directed, would have brought to them full knowledge as to the origin and nature of the trust, and that other parties besides

Mrs. Bulkley and Mrs. Nichols were interested in it. They had no moral or equitable right to assume, as they manifestly did, that Mrs. Nichols was the owner of the entire beneficial interest. They knew, or were bound to know, that her interest was only for life; consequently, that at her death the trust would cease, and that the whole estate would pass into other hands.

That the defendants participated in the breach of trust can admit of no doubt. They knew that Mrs. Bulkley and Mrs. Nichols were using the property in hazardous business, — stock speculations; that they themselves were taking the only certain profits, their commissions, while doubtful profits, almost certain losses, and probably complete disaster in the end, were the perquisites of the other party.

It seems very clear to us that the defendants are liable for the trust property, if any, now in their hands, and for the avails of that which they have disposed of, less the amount which appears to have been used for the legitimate purposes of the trust.

We will consider more in detail some of the objections raised by the defendants.

1. They contend that under the circumstances no constructive notice of an unknown and unsuspected trust can be made the basis of an action. Here doubtless they refer to the interest of the remaindermen. The defendants, knowing that the property with which they were dealing was trust property, were bound to inquire and ascertain the nature and extent of the trust. Inquiry would have informed them that the same instrument which created the trust in favor of Mrs. Nichols gave the remainder to her heirs at law. It matters not, so far as the question of notice is concerned, whether the gift over is valid or void. It is enough that there are possible parties who have an interest in the property besides Mrs. Bulkley and Mrs. Nichols. As that fact clearly appears on the face of the will, the trust is neither unknown nor unsuspected.

2. It is insisted that the action of the court of probate in distributing to trustees in trust for Mrs. Nichols is conclusive that she is the sole beneficiary. It is conclusive as to the property constituting the trust estate, but it is not conclusive as to the parties interested in the estate. The distribution is in terms made under the will, which gave Mrs. Nichols only a life estate. A life estate is necessarily followed by a re-

mainder, and the will disposes of the remainder. The court of probate makes no distribution of the remainder.

3. That the equity, if any, of the plaintiff, or any other possible beneficiary, was not only secret, unknown, and unsuspected, but was at least so doubtful that no implied or constructive notice can be imputed to the defendants. There is no doubt or uncertainty as to the equities of the reversioners. There may be a question as to who they are, but that is not such a doubt as will justify the application of the rule invoked.

4. It appears that Oliver Bulkley, while he was trustee, sold portions of the various trusts which he held, and mingled the avails in one common fund. With a part of this fund he purchased other property, taking the title in himself and Elizabeth Bulkley as trustees for Mrs. Nichols. The defendants claim that they are not liable for any of that property which came into their hands. That cannot be so. Any property purchased by the trustees to take the place of that sold by them is trust estate, so far as the defendants are concerned.

5. It is further contended that the plaintiff is not trustee for the heirs of Mrs. Nichols; that the remainder never was in trust; that the trust was created for the daughters alone, and that the heirs receive a title in fee. But the trust attaches to the property, and continues until the property is delivered to the remaindermen. The trustees are chargeable with the duty of safely keeping the property until then. The law undertakes that that duty shall be performed. If a trustee proves unfaithful, he is removed, and another appointed, who is clothed with the necessary powers to maintain the integrity of the trust. Therefore the plaintiff's right to recover does not depend upon Mrs. Nichols's interest in the property.

6. The last objection we care to consider is, that as no notice was given to the children of Mrs. Nichols of the resignation of Oliver Bulkley, that resignation, and the action of the probate court in accepting the same and in appointing another trustee, are inoperative so far as the trust relates to the heirs; that to that extent Oliver Bulkley is still trustee, and legally responsible; and that the defendants cannot be held responsible until it is demonstrated that he cannot make the fund good.

We do not think that the heirs were beneficiaries in such a sense that notice to them was necessary. The express or principal trust will terminate on the death of Mrs. Nichols. The resulting trust will enable the trustees to hold the prop-

erty until it can be delivered to the heirs. Strictly speaking, the latter could not, and did not, exist during the trusteeship of Oliver Bulkley, and cannot come into existence during the lifetime of Mrs. Nichols. It is difficult, therefore, to see how he could have been regarded as trustee for the heirs. It is doubtless true that if he had been guilty of wasting the trust estate he would be liable, either to his successor or to the heirs; but there can be no justice in holding him liable for the squandering of the estate by his successor.

It is the contention of the defendants that there should be no judgment against them in the present proceeding, even if they applied the proceeds of sales of trust shares upon their account against Mrs. Nichols in her own name, for the reason that these shares were her absolute property; that the gifts in remainder by the testator to the heirs of his daughters respectively are void by force of the statute against perpetuities; and that therefore the daughters took the fee in such shares as were put under the several trusts for their benefit.

It is the further contention of the defendants that Mrs. Nichols requested them to sell the trust shares, and apply the proceeds for her sole use and benefit, upon their account against her for the purchase of shares upon margins for her profit, and that, so far forth as that may have been done, the *corpus* of the fund has been paid to and consumed by her; and that, to the extent to which she was such absolute owner because of the invalidity of the remainder over, the defendants are to be protected by a court of equity against a judgment compelling them to make a payment to the fund which by any possibility should inure solely to her benefit.

These claims upon the part of the defendants virtually call for the judicial interpretation of the will of Charles Bulkley; for a determination of the question as to the validity of the several remainders over; of the question to what extent, if to any, Mrs. Nichols was the absolute owner of the shares which were for her use and, upon her request, taken from under the trust.

That these questions may be properly considered and finally determined, it is deemed best to remand this case, reserved for our consideration, for the purpose of giving opportunity to these defendants, if they may choose to avail themselves of it, by bill in the nature of interpleader or cross-bill, to summon into court Mrs. Nichols and the other children of Charles Bulkley, deceased, and the heirs of each of them, and make

them parties, so far as they may choose to be heard, and thus obtain a judicial construction of the will in question, to the end that the measure of right in Mrs. Nichols in the shares set apart in trust for her may be determined, and all questions presented by the respective parties may have final determination in one proceeding.

TRUSTS AND TRUSTEES—INVESTMENTS. — Investments in stocks or bonds of private corporations stand upon the same footing as loans on personal security, and therefore, where the English rule prevails, a trustee making such investments is liable for losses: *Note to Nyce's Estate*, 40 Am. Dec. 515, 516; *Simmons v. Oliver*, 74 Wis. 633; *Deegan v. Capner*, 44 N. J. Eq. 339.

THE WILLIAM ROGERS MANUFACTURING COMPANY v. ROGERS.

[58 CONNECTICUT, 356.]

CONTRACTS FOR PERSONAL SERVICE, SPECIFIC PERFORMANCE OF, NOT DECREED WHEN. — Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary personal services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of a specific performance.

INJUNCTION IN AID OF SPECIFIC PERFORMANCE OF CONTRACT FOR PERSONAL SERVICES NOT GRANTED WHEN. — The defendant agreed to serve the plaintiffs for twenty-five years under the direction of their general manager, traveling for them, and rendering such services as secretary or other officer as such manager should devolve upon him, and that he would not be engaged in or allow his name to be used in any manner in any other hardware, cutlery, flat-ware, or hollow-ware business, either as a manufacturer or seller, but would give his entire time and services to the interests of the plaintiffs. The plaintiffs brought suit for an injunction to restrain the defendant from leaving their employment, and engaging in any other hardware, cutlery, flat-ware, or hollow-ware business, or allowing his name to be used in any such business, and set out the defendant's contract, averring that his services had, by reason of his familiarity with their business and customers, become of special value to them; that he was planning with certain competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; that he intended to use for their advantage his knowledge of the business of the plaintiff; and that his doing so would cause irreparable injury to such business. On demurrer to the complaint, it was held, — 1. That it did not appear that the services were purely intellectual, special, unique, or extraordinary, or so peculiar or individual that they could not be performed by any person of ordinary intelligence

and fair learning; 2. That it did not appear that the plaintiffs had a right to use the defendant's name as a trade-mark; 3. That it did not appear that the use of the defendant's name as a stamp by the plaintiffs' competitors would do them any injury other than such as might grow out of a lawful business rivalry; and that if by reason of extraneous facts the name of the defendant did have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals did them some special injury, such facts ought to have been set out, so that the court might pass upon them; 4. That no facts were shown to bring the case within the rule that an employee should be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge.

SUIT for an injunction to restrain the defendant from leaving the employment of the plaintiffs or engaging in other business in violation of a contract. The superior court sustained a demurrer to the complaint, and rendered judgment for the defendant. Other facts sufficiently appear from the opinion.

F. Chamberlin and E. S. White, for the appellants.

C. R. Ingersoll and F. L. Hungerford, for the appellee.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance: 2 Kent's Com. 258, note b; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Sanguirico v. Benedetti*, 1 Barb. 315; *Haight v. Badgeley*, 15 Barb. 499; *De Rivafinoli v. Corsetti*, 4 Paige, 264; 25 Am. Dec. 532. A specific performance in such cases is said to be impossible, because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service.

The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation: 3 Wait's Actions and Defenses, 754; *Rutland Marble Co. v. Ripley*, 10 Wall. 340; *Burton v. Marshall*, 4 Gill, 487; 45 Am. Dec. 171; *De Pol v. Sohlke*, 7 Robt. 280; *Kemble v. Kean*, 6 Sim. 333; *Baldwin v. Society for Diffusion of Knowledge*, 9 Sim. 393; *Fothergill v. Rowland*, L. R. 17 Eq. 132.

The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their

character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages: 2 Story's Eq. Jur., sec. 958 a; 3 Wait's Actions and Defenses, 754; Pomeroy's Eq. Jur., sec. 1343; *Bank of California v. Fresno Canal Co.*, 53 Cal. 201; *Singer Sewing Machine Co. v. Union Button Hole Co.*, 1 Holmes, 253; *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *South Wales R. R. Co. v. Wythes*, 5 De Gex, M. & G. 880; *Montague v. Flockton*, L. R. 16 Eq. 189.

The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever in the judgment of said general agent the interests of the business will be thereby promoted"; and also "including such duties as traveling for said companies as said general agent may devolve upon him, including, also, any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special or unique or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract, it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flat-ware, or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver, in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with

such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership. But they make no such claim; and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case.

There is no averment, in the complaint, that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out, so that the court might pass upon them. In the absence of any allegation of such facts, we must assume that none exist.

The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employee to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge: *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664.

There is no error in the judgment of the superior court.

CONTRACTS FOR PERSONAL SERVICE — SPECIFIC PERFORMANCE. — Courts of equity will generally decline jurisdiction to decree specific performance of contracts for personal services involving the exercise of special skill, judgment, and discretion, continuous in their nature, running through an indefinite period of time; and injunctions to prevent the breach of such contracts are granted with great caution, even though the remedy by damages at law may be inadequate: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; 3 Am. St. Rep. 758; *Clark's Case*, 1 Blackf. 122; 12 Am. Dec. 213, and particularly note 216, 217.

MORGAN v. FARREL.

(36 CONNECTICUT, 412.)

PARTNERSHIP, WHAT IS. — A partnership exists between two or more persons whenever there is such a relation between them that each is as to all the others, in respect to some business, both principal and agent. They are then partners in respect to that business, but not in respect to any other business. Partnership is but a name for this reciprocal relation.

PARTNERSHIP, EVEN AGAINST INTENTION OF PARTIES, ARISES WHEN. — A partnership as to third persons sometimes arises by operation of law, even against the intention of the parties, either because the contract into which they have entered in law makes each the principal and agent of the other, or because, by a course of dealing, they have shown that such was the real relation between them.

EXISTENCE OF PARTNERSHIP, WHEN QUESTION OF LAW. — Where the terms of the agreement and the facts are all admitted, whether or not a partnership existed is a question of law.

MERE PARTICIPATION IN PROFITS OF BUSINESS DOES NOT CONSTITUTE PARTNERSHIP. — A partnership, even as to third persons, is not constituted by the mere fact that two or more persons participate or are interested in the net proceeds of a business. Where, therefore, two persons enter into a contract with a patentee, by which the latter grants to them the exclusive right to make and sell a machine for which he holds a patent, and they agree to make one machine without expense to him, and run it for two months, and afterwards to make machines to supply orders, and to pay to him an amount equal to one half the gross profits of the business, such contract does not make them partners of the patentee; nor does it make them partners as between themselves, since it does not attempt to provide in what way they, as between themselves, are to carry out their joint undertaking.

LIABILITY OF PERSON HOLDING HIMSELF OUT AS PARTNER. — The liability, as a partner, of a person who holds himself out as a partner, or permits others to do so, as to third persons who have given credit to the firm upon the faith of his connection with it, or who knew of such holding out, is predicated upon the doctrine of estoppel, and in order to charge him on that ground, it is not enough to show that he was represented by others to be a partner, or that his name appeared in the firm; it must be shown that he knew that he was being held out as a partner, and that he assented thereto, or facts must be shown from which assent can be fairly implied. And whether or not there has been such a holding out as to estop him from denying the partnership is always a question of fact.

PARTY SETTING UP ESTOPPEL BY CONDUCT MUST SHOW THAT HE EXERCISED GOOD FAITH and due diligence to know the truth; and if such circumstances are brought to his notice as would be certain to excite inquiry in the mind of any prudent man, and the means of satisfying such inquiry are readily accessible, but are not used, he cannot be held to have exercised good faith or due diligence to know the truth.

LETTERS, WHEN ADMISSIBLE IN EVIDENCE TO MODIFY OR CONTRADICT OTHER LETTERS IN EVIDENCE. — Where the plaintiff has introduced in evidence letters which had passed between the defendants, for the purpose of showing that they were partners in a certain business, the defendants

may, for the purpose of showing that these letters, or some of them, had reference to other matters, and not to that business, introduce other letters that passed between them.

ACTION on two promissory notes. The opinion states the case.

C. S. Hamilton, for the appellant.

J. W. Alling and W. H. Williams, for the appellee.

ANDREWS, C. J. On the first day of March, 1880, William M. Babbott made and delivered to the firm of Morgan and Herrick, merchants, then doing business in New York, a note for the sum of \$1,004.56, expressed to be for value received, and payable in thirty days, and on the eighth day of the same month another note, for the sum of \$2,205.60, payable in thirty days at the Ansonia National Bank, Ansonia, Connecticut. These notes were signed by Babbott in the name of "Franklin Farrel & Co.," and were delivered to Morgan and Herrick in payment for certain goods sold and delivered by them to Babbott on his order therefor.

The plaintiff is now the owner of the notes, and brings this suit to recover their amount. The complaint alleges that at the time the notes bear date Franklin Farrel and the said William M. Babbott were partners in business under the firm name of Franklin Farrel & Co. Farrel alone makes defense. No service of the complaint was made on Babbott. The answer is a general denial.

Upon the trial, evidence was offered from which plaintiff claimed to have proved that Farrel and Babbott were partners as between themselves, or at least that they were partners as to all third persons, or that Farrel was liable as a partner to Morgan and Herrick for the reason that he had permitted Babbott to hold out that Farrel and himself were partners under such circumstances that he was estopped to deny that he was a partner. Farrel denied that he was a partner in either way. The superior court rendered judgment for the defendant, and the plaintiff has appealed.

An exhaustive definition of partnership is not easy. So far as the facts in the case present the question of partnership, it is sufficiently accurate to say that there is a partnership between two or more persons whenever such a relation exists between them that each is as to all the others, in respect to some business, both principal and agent. If such a relation exists, they are partners; otherwise not. They are partners in that

business in respect to which there is this relation; and as to any other business, they are not partners. Partnership is but a name for this reciprocal relation: Story on Partnership, sec. 1; Lord Wensleydale in *Cox v. Hickman*, 8 H. L. Cas. 311; *Bullen v. Sharp*, L. R. 1 Com. P. 86; *Holme v. Hammond*, L. R. 7 Ex. 230; *Harvey v. Childs*, 28 Ohio St. 319; 22 Am. Rep. 387; *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192; Collyer on Partnership, secs. 139, 412; *Stillman v. Harvey*, 47 Conn. 26.

Between the parties themselves, this relation of principal and agent cannot exist except by their voluntary agreement: *Hazard v. Hazard*, 1 Story, 371; Collyer on Partnership, sec. 2. In the present case the finding is as explicit as language can make it that Farrel and Babbott did not intend to become partners. It says: "No paper was ever signed by or between Farrel and Babbott alone. No conversation ever took place in which it was stated, in words, that Farrel and Babbott were partners or were to form a partnership. No firm name was ever mentioned; no suggestion that either had used or could use the name or the credit of the other. Neither ever understood, intended, or thought that a partnership existed or should exist." And in addition to this, there is the express declaration of Babbott to his counsel—apparently after Farrel had written to him that he, Farrel, had stopped all work on the machine—that he did not believe there was any partnership between them. This part of the case is not pressed, and we need not pursue it.

A partnership as to third persons sometimes arises by operation of law, even against the intention of the parties; and this happens either because the contract which the parties have entered into in law makes each the principal and agent of the other, or because by a course of dealing they have shown that such was the real relation between them. Such were the cases of *Parker v. Canfield*, 37 Conn. 250; 9 Am. Rep. 317; and *Citizens' Nat. Bank v. Hine*, 49 Conn. 236. It is laid down in *Everett v. Chapman*, 6 Conn. 347, that, where the terms of the agreement and the facts are all admitted, whether or not a partnership existed is a question of law for the court to decide. The plaintiff claims that from the facts found by the superior court it does appear that Farrel and Babbott were partners *quoad* third persons, notwithstanding their intent not to be partners. The facts from which the partnership is claimed to arise are mainly the exhibits 1, 2, and 3; and of these, exhibit 2 is the only one important. All the other facts

derive their significance solely from the construction that is to be put on this exhibit.

Exhibit 2 purports to be no more than an agreement between the Cook Ice and Refrigerating Company, party of the first part, and Franklin Farrel and William M. Babbott, party of the second part, by which the party of the first part, being the owner of patents therefor, grants to the party of the second part the exclusive right to manufacture and sell refrigerating machines and apparatus for refrigerating, as described in the patents, throughout the United States, for the full term for which the patents were granted. And in consideration of that grant the party of the second part undertakes and agrees, with all diligence and dispatch, and without expense or charge to the party of the first part, to manufacture a refrigerating machine under the patents, and for the purpose of aiding and benefiting the business intended in the agreement, to run the machine for at least two months subsequent to its completion. The party of the second part also agrees to use its best endeavors to create a public demand for the machines, and to manufacture machines to supply any *bona fide* order therefor, and agrees to pay to the party of the first part an amount equal to one half of the gross profits accruing therefrom. There are other provisions in the agreement, but all having reference to the duties and obligations of the parties thereto.

That such a contract as this does not make the parties—that is, the party of the first part and the party of the second part—partners is settled by abundant authority. It only provides a way in which the party doing the work is to be paid for its services: *Chase v. Barrett*, 4 Paige, 148.

The only relation of Farrel and Babbott that appears by this agreement is that of joint contractors to manufacture refrigerating machines for the Cook company. There is no suggestion in it that either is, or is to be, the agent of the other. It does not attempt to provide in what way Farrel and Babbott, as between themselves, are to carry out their joint undertaking. A community of interest does not make a partnership: *Loomis v. Marshall*, 12 Conn. 77; 30 Am. Dec. 596; *Porter v. McClure*, 15 Wend. 186. Thus tenants in common of land are not partners: *Calvert v. Aldrich*, 99 Mass. 74; 96 Am. Dec. 693. In *Oliver v. Gray*, 4 Ark. 425, it was holden that two persons, joint owners of a horse, were not partners in respect to a contract for its keeping. *French v. Styring*, 2 Com. B., N. S., 357, was a case where two men owned a

race-horse which they entered in a race and won a prize. It was held that they were not partners as to that money. In *Hawkins v. McIntyre*, 45 Vt. 496, the defendant contracted to finish off a church for the sum of four thousand five hundred dollars. Afterwards he agreed with the plaintiff that they should work together in doing the job, each working himself, the work of each to offset that of the other, and the expense of materials and of other work to be deducted from the amount, and the balance to be divided between them. It was held that they were not partners. In the case above cited, *Loomis v. Marshall*, 12 Conn. 77, B was the owner of a satinet factory. A agreed with B to furnish all the wool that should be needed at the factory for two years, which B agreed to manufacture into cloth, the net proceeds of the cloth, after deducting the incidental charges of sale, to be divided so that A should have fifty-five per cent and B forty-five per cent. It was held that there was not a partnership as to third persons.

It probably could be inferred that Farrel and Babbott were to divide between themselves whatever was left, if anything, after paying the Cook company. But a partnership, even as to third persons, is not constituted by the mere fact that two or more persons participate or are interested in the net proceeds of a business: 1 Lindley on Partnership, 24; *Holme v. Hammond*, L. R. 7 Ex. 230; *Loomis v. Marshall*, 12 Conn. 77; *Ex parte Tennant*, L. R. 6 Ch. Div. 303; *Bullen v. Sharp*, L. R. 1 Com. P. 86.

Mr. Farrel was a manufacturer of machinery, of long and wide experience. He was at the head of a company in Ansonia, in this state, engaged in manufacturing machinery, and employing four or five hundred hands. Work on a refrigerating machine was begun promptly at the factory in Ansonia under the supervision of Mr. Cook, the patentee, and with the aid of one David Smith and of one Greene, but with no success. "The machines broke down and proved so faulty and imperfect in their nature, and the business in all respects so unsatisfactory, as not to justify or warrant proceeding. Not a dollar's return in any form was ever received from the business or venture." In the language of the finding, it was "only failure after failure." On September 22, 1879, Farrel wrote Babbott that he had stopped all work on the machine until he could see him. Work did stop at Ansonia at that time, and was never resumed. About November 1, 1879, the Cook company gave Farrel notice to annul the contract with

them, as by its terms they had a right to do; which notice Farrel at once communicated to Babbott. Prior to the stopping of the work on the machines, no act had been done by Babbott or by Farrel in which either had assumed to act for or to bind the other. Everything they had done in carrying out their contract with the Cook company had been done by them jointly.

There was no writing, and there was no course of conduct prior to that time from which any one could be led to believe that these three men were partners. It was subsequent to this time that Babbott commenced and continued in New York the series of acts from which the plaintiff claims "that the court erred in not holding, ruling, and deciding that the defendant Farrel was a partner with the said Babbott as to and against third parties, especially as to and against the plaintiff."

A person who holds himself out as a partner, or permits others to do so, is liable as such to third persons who have given credit to the firm upon the faith of his connection with it, or who knew of such holding out. The liability in such cases is predicated upon the doctrine of estoppel, and in order to charge a person on that ground it is not enough to show that he was represented by others to be a partner, or that his name appeared in the firm; it must be shown that he knew that he was being held out as a partner, and that he assented thereto, or facts from which assent can be fairly implied: *McBride v. Protection Ins. Co.*, 22 Conn. 259; *Buckingham v. Burgess*, 3 McLean, 364.

It is always a question of fact whether or not there has been such a holding out as to estop a party from denying the partnership: *Wood v. Duke of Argyle*, 6 Man. & G. 928; *Lake v. Duke of Argyle*, 6 Q. B. 477. And so the decision of the superior court is conclusive, unless there is some error in its proceedings. Upon an examination of this part of the case, we are satisfied that the result to which the court came was fully required by the facts.

In May, 1879, while the parties were at work at Ansonia endeavoring to construct a refrigerating machine, and also were seeking to find or to create a demand for the machines when they should be ready, one F. L. Babbott, a brother of W. M. Babbott, called on a Mr. Blackwell, of Blackwell & Co., warehousemen in Clarkson Street, New York, with reference to furnishing them with a machine; and on the twenty-ninth

day of July following, W. M. Babbott entered into an arrangement with Blackwell & Co., as shown by exhibit 4. It was explained to Blackwell that the machine was to be built by Franklin Farrel, of the Farrel Foundry Company, at Ansonia, Connecticut. At that time there was no machine or apparatus in condition to be set up, and as none was ever completed, nothing was done under that arrangement.

"The first knowledge that Mr. Farrel had that any use was being made of his name or credit in any form was about January 1, 1880, when a three months' note, dated October 22, 1879, signed 'Franklin Farrel & Co.,' payable at Ansonia National Bank, was brought to his attention a few days before it fell due, by the cashier, who asked him what he knew about it. Up to that time he had never learned that there was any claim to a partnership with him made by Babbott. He knew nothing of Blackwell except as above stated, never saw him until long after, was never at Clarkson Street, and had no knowledge of any business done there. He had no knowledge of any transaction with Morgan and Herrick, and had never heard of that firm until the notes in suit matured and were demanded and protested. He did not know that Smith was in New York, and could not find or meet Babbott there." Such is the finding, and it is added that he knew nothing of the Delamater Iron Works, or that Babbott had any dealings with it. It appears, then, that the only fact which the defendant knew was, that some one had wrongfully used his name on that note. It does not appear that at the time he knew that Babbott was the man. Inferentially it would seem that he did not know, for it is stated that he could not find Babbott in the city. But without pausing to remark on the dearth of knowledge the defendant had of Babbott's doings, we pass to another feature in this part of the case.

A party setting up an estoppel by conduct is bound to the exercise of good faith and due diligence to know the truth: *Bigelow on Estoppel*, 480; *Moore v. Bowman*, 47 N. H. 499; *Odlin v. Gove*, 41 N. H. 465; 77 Am. Dec. 773.

When Babbott began his operations with Morgan and Herrick he showed them a copy of the contract with the Cook company, and also a letter from Farrel, in which occurred the words: "I have concluded to go on with the business," accompanied with statements that he and Farrel were partners. They were told that the goods were to be used in the manufacture of a refrigerating machine by Franklin Farrel &

Co., at Clarkson Street, New York City. They seem not to have been satisfied with the terms of that contract, nor with the statements that were made to them; for they made inquiries of the Delamater Iron Works, of which Farrel knew nothing, and of the mercantile agencies of Dun, Barlow, & Co. and of Bradstreet & Co. From these agencies, they were able to learn nothing as to any firm of Franklin Farrel & Co., who composed it, or as to its responsibility, or that there was any such firm at all. If Babbott and Farrel had been partners by virtue of the contract with the Cook company, they had been such since the twenty-second day of March, 1879. The absence of the name of any such firm from these mercantile agencies was a most significant circumstance. These agencies made known to Morgan and Herrick all about Franklin Farrel and his responsibility. These agencies could tell, and presumably did tell, where Farrel lived, and in what business he was engaged; that he was a man of large means, a large manufacturer of machinery, having a large factory, and employing many hands in that kind of work. From this information, Morgan and Herrick would know that the manufacture of a refrigerating machine would be in the exact line of work Farrel was doing at his own factory in Ansonia, Connecticut. That such a man, having such facilities, was represented to be carrying on the manufacture of a refrigerating machine in a warehouse in Clarkson Street, in the city of New York, and that he was doing it on credit, would be certain to excite inquiry in the mind of any prudent man. Why did not Morgan and Herrick inquire further? Mr. Farrel was a manufacturer in Connecticut, not in the city of New York. In a manufacturing partnership, the place where it was to be carried on would be likely to be a controlling feature. For such work there must be machinery to use, and power to run it, and men to operate it. All these Mr. Farrel had in Connecticut, and none of them in New York. The court had judicial knowledge that Ansonia was easily accessible from New York City by railway, that there was frequent communication by mail, or that the telegraph might have been used and a reply obtained in half an hour and at trifling expense: Wharton on Evidence, sec. 339. When so many circumstances called for inquiry, and with all these means by which inquiries could have been satisfied, and when none of them were used, we cannot hold that the plaintiff's assignors exercised good faith or due diligence to know the truth.

On the trial the plaintiff introduced a large number of letters and postal-cards which had passed between Farrel and Babbott for the purpose of showing that they were partners in the refrigerating business. The defendant claimed that these letters, or some of them, had reference to other matters, and not to the refrigerating business, and to show this, offered other letters and postals that had passed between them. To these the plaintiff objected, but the court admitted them solely for the purpose named. That letters which had passed between these men might tend to show that they were partners in any business is very obvious, and that other letters on the same or a kindred subject might modify or contradict the first ones is equally obvious. The real relation between the parties could best be shown by the whole correspondence, not by a part of it.

There is no error in the judgment appealed from.

WHAT CONSTITUTES A PARTNERSHIP. — Two essentials of a partnership contract are, a common interest in the stock of the company and a personal responsibility for the partnership engagements: *Bromley v. Elliot*, 38 N. H. 287; 75 Am. Dec. 182, and note. The right to receive a share of the profits of a business does not furnish an invariable test of a partnership; the real ground of liability is, that the persons act for each other as principal and agent: *Seabury v. Bolles*, 51 N. J. L. 103. Thus an agreement for working a quarry by two persons, one of whom is to manage the business, and the other to give his whole time thereto, dividing the net profits between them, is a partnership: *Quinn v. Quinn*, 81 Cal. 14. And so three persons were partners, under an agreement between them to carry on a business under a firm name, the agreement being to the effect that two of them were to assign to the third an interest in a patent; that the third was to buy materials and sell the product, control the finances, and furnish the capital, failing to do which either or both of the others might assume control and management of the business; that the net profits should be divided equally between them; and that neither should sell or assign his interest without the written permission of the others: *Dame v. Kempster*, 146 Mass. 454. Even an agreement between two corporations engaged in making cotton-seed oil to select a committee composed of members from each corporation, and turn over to this committee the properties and machinery of each company, to be managed and operated for a certain time by such committee for the benefit of both companies, the profits and losses to be shared by both in stipulated proportions, is a partnership: *Mallory v. Hanau Oil Works*, 86 Tenn. 598. Where the owner of land and the one in possession thereof enter into an agreement to buy and sell coal and hay, part of which is to be obtained from the land, all transactions to be carried on under a firm name, they are partners, at least as to such business: *Duff v. Baker*, 78 Iowa, 642.

PARTNERSHIP — QUESTION OF FACT. — When the question whether a partnership exists is a matter of doubt, to be determined from inferences to be drawn from all the evidence, it is one of fact for the jury: *Seabury v. Bolles*, 51 N. J. L. 103; *Mawrer v. Miday*, 25 Neb. 575.

PARTNERSHIP — THIRD PERSONS. — All persons sharing in the profits of a concern are presumed to be partners, so far as third persons are concerned; but this presumption may be repelled: *Robinson v. Allen*, 85 Va. 721. Compare *Cooley v. Broad*, 29 La. Ann. 345; 29 Am. Rep. 332.

PARTNERSHIP. — Liability of one holding himself out, or allowing himself to be held out, as a partner: *Fletcher v. Pullen*, 70 Md. 205; 14 Am. St. Rep. 355, and note 361, 362.

INGRAHAM v. TAYLOR.

[58 CONNECTICUT, 523.]

STOCK-BROKER NOT BOUND TO MAKE ACTUAL PURCHASE OF STOCKS HELD ON MARGIN. — Where stock-brokers agree to buy certain stocks for a customer on a margin, and to hold them subject to his demand, the customer to advance sufficient money, when required, to protect them from loss, they are not bound to make an actual purchase of the stocks, but it is enough if they were ready and able at any time to procure them in the market and deliver them on demand at the price of the day of the contract. And if the stocks depreciate to the extent of the customer's account, no damage could have resulted to him from their failure to make an actual purchase.

ACTION to recover money advanced for the purchase of certain stocks. The opinion states the case.

C. E. Perkins and S. E. Clarke, for the plaintiff.

A. P. Hyde and L. Sperry, for the defendants.

PARDEE, J. In effect, the claim of the plaintiff is, that between the twenty-seventh day of April and the thirtieth day of August, 1887, the defendants, stock-brokers, made several contracts to purchase and carry for him on a margin account certain stocks; that he paid to them on that account more than five thousand dollars; and that they did not purchase any stocks, but converted the money to their own use. His suit is for the recovery of the money so paid.

The defendants reply, in effect, that they purchased, between the days mentioned, sundry stocks for and at the request of the plaintiff on margin, and that the stocks depreciated to the extent of his account, and that the plaintiff paid the money on that account.

Upon the finding, on April 27, 1887, and on divers days between that day and the twenty-sixth day of August following, the defendants, at Hartford, where they carried on their business, made several agreements with the plaintiff to buy and hold specified stocks for him on a margin account;

he to pay, as required, sufficient money to protect them from loss.

By such contracts the plaintiff bought the right to demand at his option as to time the delivery of shares at the price of the day of the agreement; the defendants, in consideration of his payments upon margins, assumed the risk of an undertaking to deliver shares upon demand at that price.

He secured the possibility of profit if within an indefinite time the selected stock should rise in price, without being compelled to furnish the capital necessary for the purchase of it. Such contract does not import that the defendants obligated themselves to furnish the capital necessary for the payment of the full price of the shares upon the day of the contract as upon the taking of a certificate thereof, and allow the plaintiff to lock up that capital, indefinitely as to time, at his option, without interest, when the profits of the transactions were all to him, and the losses, in part, possibly to them. Nor is it of the essence of the contract that they should acquire possession of a certificate of the shares on the day of its date.

He designedly made the day of demand uncertain; and inasmuch as each share is the equal of any other in the same corporation, and the shares of the corporation specified were in the market on every day, the possession of a certificate bearing a particular date is not required; only that they should be able to deliver it upon demand, at the price of the day of the contract. The contract required the plaintiff to put his margin money at the hazard of their ability to respond in the event of a rise in the price of shares; required him to furnish all capital necessary for the speculation; secured to him all profits; and denied to them any advantage other than the customary commission.

As has been said, the money paid by him to them was the consideration for their risk in agreeing to become responsible for specified shares during an indefinite period at the price of the day of contract, and as they did assume such risk, and the shares did depreciate to the full extent of the margins paid to them, they performed their contract and earned and exhausted the margins. For while the plaintiff continued in the exercise of his right to rest upon margins before he had put an end to his period of uncertainty, and before he had asked for or was willing to receive any certificate, he ordered the sale of specified shares if they should reach a fixed point in depreciation.

These were sold upon such order; and such sale is legally equivalent to a delivery of a certificate therefor to him. And certificates for the remaining shares were delivered upon his order. He has thus had everything which his contract secured to him,—unlimited opportunity for speculation, and certificates upon demand at the price of the day of his contract.

And as the shares depreciated, the contract has never been anything but a burden on him. He has failed to prove that any act or omission to act upon the part of the defendants has worked any injury to him.

The superior court is advised to render judgment for the defendants.

BROKERS — PURCHASE OF STOCKS. — For a thorough discussion of the relation of a stock-broker to his client, and the duties required of him, see extended note to *Horton v. Morgan*, 75 Am. Dec. 313-326.

ROCKVILLE NATIONAL BANK v. HOLT.

[58 CONNECTICUT, 535.]

SURETY NOT DISCHARGED WHERE CREDITOR RESERVES HIS RIGHTS AGAINST HIM. — Where the holder of the notes of an insolvent corporation, indorsed by a third person, signs a composition deed by which the creditors assign their claims to a reorganising committee, and agree to take in payment the stock of the reorganized company, but upon signing the deed adds a reservation of all rights against the indorser, the latter will not be discharged from his liability as surety.

SURETY KNOWING AND ASSENTING TO EXTENSION OF TIME OR NEW CONTRACT NOT DISCHARGED. — A surety who knows that a creditor has given time to or made a new contract with the principal debtor, and assents to such new contract, is not discharged by the giving of the time or by the making of the new contract.

ACTION against the defendant as indorser of certain notes and bills. The opinion states the case.

C. Phelps, for the appellant.

C. E. Gross, for the appellee.

ANDREWS, C. J. The L. B. Smith Rubber Company, a corporation doing business at Setauket, New York, being indebted to the defendant, gave him three promissory notes, and accepted three bills of exchange, representing such indebtedness and aggregating in the whole something more than five thousand dollars. All of the notes and bills were payable to

the order of the defendant, were by him indorsed, and at his request were discounted for his benefit by the plaintiff. Shortly thereafter the rubber company failed. That failure compelled the defendant to go into insolvency. The plaintiff presented its claim against his insolvent estate and received a dividend thereon. The defendant having since that time acquired other property, the plaintiff brought this suit and attached such other property. Since the bringing of this suit the plaintiff, in common with nearly all the creditors of the L. B. Smith Rubber Company, including the defendant, signed an agreement which is fully set out in the finding, but which it is not necessary here to repeat. For the purposes of the present discussion it is sufficient to say that that agreement provided, among various other things, that the creditors of the rubber company should assign their claims to certain persons called a reorganizing committee, and that this committee should proceed to reorganize the company and should issue to each of the several creditors in payment for their respective claims the stock of the reorganized company, which the creditors agreed to accept. When the plaintiff signed the agreement it added to its signature: "Reserving all rights against R. G. Holt, or against his estate, or assignee for the benefit of his creditors." These words did not appear in the body of the instrument.

The defendant insists that by signing the agreement the plaintiff assigned all its claim against the L. B. Smith Rubber Company to the reorganizing committee, and that as he is liable to the plaintiff only as a surety for that company, the assignment of the claim against the principal debtor discharges him.

That an unqualified release of a principal debtor will be a discharge also of the surety is admittedly good law. The plaintiff, however, claims that by the reservation appended to its signature it is not affected by that rule. The defendant cites two cases, either of which by its terms fully supports his contention. But the authority of each of these cases is greatly weakened, if not entirely overturned, by later decisions in the same jurisdiction. *Webb v. Hewitt*, 3 Kay & J. 438, is substantially overruled by *Green v. Wynn*, L. R. 7 Eq. Cas. 31, and L. R. 4 Ch. App. 204; and *Farmers' Bank v. Blair*, 44 Barb. 641, by *Morgan v. Smith*, 70 N. Y. 545; *Colvo v. Davies*, 73 N. Y. 211; *National Bank v. Bigler*, 83 N. Y. 51; and *Shutte v. Fingar*, 100 N. Y. 539; 55 Am. Rep. 231.

It is stated in *De Colyar on Principal and Surety*, 418, that such a reservation as was made by the plaintiff prevents there being any discharge of the surety, and gives as authority *Kearsley v. Cole*, 16 Mees. & W. 128; *Wyke v. Rogers*, 1 De Gex, M. & G. 408; *Boaler v. Mayor*, 19 Com. B., N. S., 76, 84; *Owen v. Homan*, 4 H. L. Cas. 997; and *Close v. Close*, 4 De Gex, M. & G. 176. See also *Tobey v. Ellis*, 114 Mass. 120; *Kenworthy v. Sawyer*, 125 Mass. 28; *Bank v. Lineberger*, 83 N. C. 454; *Morse v. Huntington*, 40 Vt. 493; *Hagey v. Hill*, 75 Pa. St. 108; 15 Am. Rep. 583; *Mueller v. Dobschuetz*, 89 Ill. 176. The weight of authority seems to us to be strongly adverse to the defendant's claim.

There is another view of the case which makes it clear that the defendant is not entitled to a discharge by reason of the plaintiff's signing the agreement. Whenever a creditor gives time to or makes a new contract with the principal debtor, of which new contract the surety has knowledge, and to which he assents, he is not thereby discharged: *Adams v. Way*, 32 Conn. 160; *Corlies v. Estes*, 31 Vt. 653; *Smith v. Winter*, 4 Mees. & W. 454. The composition agreement was beneficial to all the creditors of the L. B. Smith Rubber Company, provided all entered into it. The defendant and his trustee in insolvency signed it before the plaintiff did. It was obviously for the advantage of each that the other should sign. Without some such arrangement, neither could ever hope for any payment from that company. With such an arrangement, there was a chance that they might both be paid in full. The plaintiff signed with the knowledge that the defendant and his trustee had previously signed. A composition deed implies not only an agreement of the debtor with each of his creditors, but, also an agreement by each creditor with each of the others. The signing of such a deed by any creditor is in some measure a request to all the others to sign also. The circumstances of this case show pretty clearly that the defendant knew of and assented to the act of the plaintiff in signing the agreement.

There is no error in the judgment complained of.

SURETIES, DISCHARGE OF. — A surety will not be discharged unless the creditor does some act by which he deprives himself of the right to proceed at law for the collection of the obligation; and without such act, even an extension of time will not release the surety: *Rucker v. Robinson*, 38 Mo. 154; 90 Am. Dec. 412. To work a discharge of a surety, there must be an

agreement for an extension of time, made without the consent of the surety, which precludes the creditor meanwhile from enforcing the debt against the principal: *Powers v. Silberstein*, 106 N. Y. 169; and the extension must be for a definite period, and for a valuable consideration: *West v. Brison*, 99 Mo. 684.

CONNELLY v. MASONIC MUTUAL BENEFIT ASS'N.

[68 CONNECTICUT, 552.]

DECISIONS OF VOLUNTARY ASSOCIATIONS NOT INTERFERED WITH BY COURTS WHEN. — The decisions of any kind of a voluntary society or association in admitting, disciplining, suspending, or expelling members are of a *quasi* judicial character, and the courts will never interfere in such cases, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, in good faith, and not in violation of the law of the land. If it is found that the proceeding was had fairly, in good faith, and pursuant to its own laws, and that there was nothing in it in violation of the law of the land, the sentence is conclusive, like that of a judicial proceeding.

DECISION OF GRAND MASTER OF MASONS, WHEN FINAL. — Where the grand master of Masons has, under the rules and laws of the organization, jurisdiction and authority to determine whether or not a vote of a Masonic lodge rendering a member unaffiliated is valid, and he decides that the vote by which a member was rendered unaffiliated was void, and orders him to be restored as of the date of his apparent suspension, his decision is final and conclusive; and if the lodge thereupon reverses the vote of unaffiliation, such member is thereby restored to membership, and stands as if no such vote had ever been passed. Nor is such decision affected by the fact that it was not rendered until after the death of the member.

DECISION OF DEPUTY GRAND MASTER OF MASONS NOT OPEN TO REVIEW WHEN. — Where it is found that a deputy grand master of Masons had jurisdiction to act in a matter, his decision upon a question of fact involved in the case is not open to review by a court of law.

ACTION to recover money claimed to be due to the plaintiff as the beneficiary of a deceased member of the defendant. The superior court rendered judgment for the plaintiff, to recover only the amount of assessments paid by the member in his lifetime. The plaintiff appealed. Other facts are stated in the opinion.

W. K. Townsend and G. D. Watrous, for the appellant.

W. C. Case and W. H. Ely, for the appellee.

ANDREWS, C. J. The plaintiff is the widow of Henry M. Connelly, who died January 28, 1885, and, as the beneficiary named by said Connelly in his application for membership in the defendant association, is entitled to recover of the defend-

ant the sum of two thousand dollars, if Connelly, at the time of his death, was a member of the defendant association.

Connelly became a member of the defendant association in 1880. At that time he was a member in good standing of Baltic Lodge No. 284, Free and Accepted Masons, of the city of Brooklyn, New York. Membership in good standing in some Masonic lodge was a condition to admission into and to the continuance of membership in the defendant association. One of the by-laws of the defendant provides that "any member of this association who shall forfeit the benefit of his lodge by non-payment of dues shall forfeit all rights to benefits in this association; and any member suspended or expelled from his lodge, or who shall stand non-affiliated for one year, shall forfeit his membership in this association."

By a vote of Baltic Lodge, at a meeting held on the eleventh day of October, 1882, Connelly was regularly suspended or unaffiliated for non-payment of dues. The defendant's pleadings show no other reason why he was not a member in its association at the time of his death than his non-affiliation in Baltic Lodge as shown by its vote. By another vote of Baltic Lodge, passed the first day of December, 1888, the name of Henry M. Connelly was restored to the rolls of the lodge as of the day of his alleged suspension. The contention of the plaintiff is, that the effect of the last vote is to render the former one void, and as though it had never been passed. If the contention is right, then she is entitled to recover the two thousand dollars; otherwise not.

By the laws of Masonry, Baltic Lodge, while it had the government of its own members and the power to discipline them, is itself subject to the grand lodge of the district in which it exists, and to the constitution and statute laws of such grand lodge. Section 46, article 24, of the constitution of the grand lodge of the district within the limits of which Baltic Lodge is located, provides as follows: "A lodge shall have power to enact a by-law which shall provide a penalty for the non-payment of lodge dues, which penalty shall be unaffiliation; but such penalty shall not be inflicted except for the non-payment of at least one year's dues, nor until the brother shall have been duly summoned thirty days previous to pay said one year's dues." Another statute of the grand lodge provides that "in order to unaffiliate a member for non-payment of dues a lodge must act under a by-law passed in accordance with the section of the constitution and statutes

of the grand lodge for that purpose made and provided." Another section prescribes the form and requisites of a summons to be used by a lodge in such cases, and how it must be addressed. Section 35 of the constitution of the grand lodge provides that "each district deputy grand master shall have power, and it shall be his duty (among other things), to determine and order in what cases a member (of an individual lodge) alleged to have been illegally stricken from the rolls, rendered unaffiliated, or suspended for non-payment of dues only, shall be restored to the rolls or reinstated; and if he discover in his district any Masonic error or evil, to endeavor to immediately arrest the same by Masonic means, and if he judge it expedient, to specially report the same to the grand lodge."

Eustace H. Wheeler, district deputy grand master of said district, having in the fall of 1888 investigated the circumstances under which Connelly was suspended, as aforesaid, on or about November 1st of that year declared his unaffiliation or suspension void, upon the ground that the summons used by Baltic Lodge did not conform to the requirements of the grand lodge, and ordered his name to be restored to the rolls of Baltic Lodge as of the date of his alleged suspension; and the decision of the deputy grand master was affirmed by the grand master of the state of New York. In accordance with said decision and order, Baltic Lodge, on the first day of December following, voted "that the name of said Henry M. Connelly be restored to the rolls of said lodge as of the date of his alleged suspension."

The facts so set forth in the finding indicate that the Masonic organization has a due and orderly system of laws and rules, enacted by itself and enforced by its own agencies, in accordance with which membership in any lodge is acquired, continued, suspended, or lost; and that all questions of membership or non-membership or of good standing in any lodge, or of affiliation or non-affiliation, are by these laws and rules within the jurisdiction of their own officers, and that when any such question has been passed upon by their own tribunals, subordinate and appellate, the decision is conclusive and binding upon all Masons; and that according to these laws and rules, an apparent non-affiliation of any member having been declared to be void by the proper appellate authorities, and having been revoked by the lodge of which he was a member, and his name restored to its rolls as of the date of his alleged suspension, he would be all the time a member in good standing of the lodge.

The defendant association contracted with Connelly on the basis that he was a Mason, and that he should remain a Mason. It would have been easy for the defendant and Connelly to have agreed upon some method by which the question of his being or remaining a Mason should be decided so as to be binding upon them both. In the absence of any agreement in what way his membership in some Masonic lodge was to be proved, or how his continuing to be a Mason in good standing was to be shown, we should naturally infer that these questions were to be decided by the Masonic tribunals. There is no other authority by which these questions could be decided. And it appears that this is just what the defendant did. When Connelly applied to become a member of the defendant association, they asked for and received a certificate signed by an officer of Baltic Lodge that he was a Mason. They accepted that as conclusive, and admitted him to membership in the association. When Connelly died they asked for a certificate to be signed by the secretary of Baltic Lodge that he continued to be a Mason. The forms, of which copies are set forth in the record, indicate that they are such as are used by the defendant in all cases. They did in the case of Connelly precisely what they do in the case of every one of their members. They referred the question of being or not being a Mason to the Masonic officers themselves. Such a usage shows that it is really a part of the contract made by the defendant with each of its members that Masonic questions shall be decided by Masonic tribunals. This is a usage by which we think the defendant must be concluded. In the light of this usage and of all the evidence, we think the contract between the defendant and Connelly must be construed as though it provided in terms that the question of his being or continuing to be a Mason in good standing should be decided by the Masonic officers.

The decisions of any kind of a voluntary society or association in admitting members, and in disciplining, suspending, or expelling them, are of a *quasi* judicial character. In such cases the courts never interfere, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land. If it is found that the proceeding was had fairly, in good faith, and pursuant to its own laws, and that there was nothing in it in violation of any law

of the land, then the sentence is conclusive, like that of a judicial tribunal: *Whitney v. First Eccl. Soc.*, 5 Conn. 405; *Gibbs v. Gilead Eccl. Soc.*, 38 Conn. 153; *Otto v. Journeymen Tailors' Union*, 75 Cal. 308; 7 Am. St. Rep. 156; *Commonwealth ex rel. Bryan v. Pike Beneficial Soc.*, 8 Watts & S. 250; *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625; *People ex rel. Rice v. Board of Trade*, 80 Ill. 134; *Robinson v. Yates City Lodge*, 86 Ill. 598; *White v. Brownell*, 3 Abb. Pr., N. S., 318.

Connelly's name was stricken from the rolls and he was rendered unaffiliated by a vote of Baltic Lodge for the "non-payment of dues only." In such a case it was within the jurisdiction of the deputy grand master, Wheeler; and it was his duty to determine whether such striking from the rolls was illegal or not; and if he found it to be illegal according to Masonic rules, it was his duty to order the name to be restored to the rolls. The deputy grand master, having investigated the circumstances of Connelly's case, did find the vote by which he was rendered unaffiliated to be void, and he ordered his name to be restored to the rolls, and it was restored as of the date of his apparent suspension. This judgment of the deputy grand master was affirmed by the grand master of the state. By the reversal of this vote of unaffiliation, and by the action of Baltic Lodge, Connelly was reinstated as of the date of that vote, and he stood as a member of that lodge at the time of his death as if no such vote had ever been passed.

It is objected to the decision of the deputy grand master that it was not made till after Connelly died. His death produced no change in the rights of the plaintiff to have the unaffiliation set aside if it was illegal. Possibly she had no right to ask for such reversal until his death. It would seem reasonable, therefore, that her right to procure such reversal ought not to abate by his death: *Marck v. Supreme Lodge of Knights of Honor*, 29 Fed. Rep. 896; *Lazensky v. Supreme Lodge etc.*, 31 Fed. Rep. 592. A copy of the summons used by Baltic Lodge in Connelly's case is shown in the finding. It is claimed that the decision of deputy grand master Wheeler, that the summons did not conform to the requirements of the grand lodge, is not supported thereby. That objection is not open to us. It being found that the deputy grand master had jurisdiction to act in the matter, his decision, upon a question of fact involved in the case, is not

open to review by a court of law: *Chase v. Cheney*, 58 Ill. 509; 11 Am. Rep. 95; *Walker v. Wainwright*, 16 Barb. 486.

There is error in the judgment appealed from, the plaintiff on the facts found being entitled to recover the two thousand dollars.

REDRESS IN COURTS OF LAW AGAINST PROCEEDINGS IN LODGES, CHURCHES, AND OTHER VOLUNTARY ASSOCIATIONS. — This subject is fully discussed in the note to *Otto v. Journeymen Tailors' P. & B. Union*, 7 Am. St. Rep. 160-170; in the note to *Austin v. Searing*, 69 Am. Dec. 671-678; and in the note to *Hiss v. Bartlett*, 63 Am. Dec. 776, 777. And the subject of suits by and against unincorporated societies is considered in the note to *Phipps v. Jones*, 59 Am. Dec. 711-718.

The duty of an expelled member of a voluntary association to exhaust, by appeal or otherwise, all the remedies within the organization arises only where the association is acting strictly within the scope of its powers: *Mulroy v. Supreme Lodge K. of H.*, 23 Mo. App. 463. While such associations may prescribe regulations as to procedure in enforcing claims, and may require appeals to be taken to superior bodies before instituting suit, they cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of their members upon contracts: *Bauer v. Samson Lodge K. of P.*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133. A by-law merely giving a member the right to appeal to a superior body will not deprive him of his right to sue; to have that effect, it must positively require him to prosecute an appeal before resorting to the courts for redress: *Bauer v. Samson Lodge K. of P.*, 102 Ind. 262. A mere voluntary association possesses no judicial powers, and can confer none upon its officers. *Davis v. Mayo*, 82 Va. 97. And an arrangement by which members of such an association undertake to confer judicial power, in respect to the property in which they have a common interest, upon officers to be from time to time selected out of the association at large, as a tribunal having general authority to adjudicate upon alleged violations of the rules of the association, and to decree the forfeiture of the property rights of the parties adjudged to be guilty of such violations, is void: *Wicks v. Monihan*, 54 Hun, 614.

Notice of the charge preferred against a member of a voluntary association, and an opportunity to be heard, must be given before he can be expelled therefrom: *New York Protective Association v. McGrath*, 23 N. Y. St. Rep. 209. A church organization may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to these rules. If, however, it has no rules on the subject, those of the common law prevail; and before a member can be expelled, notice must be given him to answer the charge made against him, and an opportunity offered to make his defense, and an order of expulsion made without such notice is void: *Jones v. State*, Sup. Ct. Neb., January, 1890. In *Lewis v. Wilson*, 121 N. Y. 284, a member of a stock exchange, a voluntary unincorporated association, being charged with the violation of a contract, refused to appear and answer the charge. The charge was sustained, and under the rules of the association he was suspended unless he paid the claim or appealed to the arbitration committee. He did neither, but sued for reinstatement as a member, setting up that the alleged contract, for the violation of which he was charged, was a gambling contract, and that its violation was not a breach of contract.

The court held that it was immaterial, and that he was not entitled to judgment. A court of equity may restrain an association from further transacting its business, where its officers have been guilty of illegal conduct, and an injunction is necessary to protect the assets from further illegal management: *Peltz v. Supreme Chamber of Order of Financial Union*, N. J. Ch. Ct., March, 1890.

An injunction will be granted to restrain part of the members of a voluntary association from incorporating a society under the name of the association: *McGlynn v. Post*, 21 Abb. N. C. 97; *Rudolph v. Southern Beneficial League*, 23 Abb. N. C. 199. Nor can dissatisfied members of such an association by incorporating themselves deprive the voluntary association of the right to use its own name, and if they attempt to do so, they will be restrained by injunction: *Black Rabbit Association v. Munday*, 21 Abb. N. C. 99. But where the constitution of a club regulates the trial of offenses against the club, the court will not enjoin the club from proceeding in such trial against an accused member, before any violation of his right to a fair trial is shown: *Gebhard v. New York Club*, 21 Abb. N. C. 248. Individuals who leave an incorporated society, and form a voluntary one, cannot maintain a suit to recover the corporate funds, where the corporation remains entire and in full possession of all its rights: *Goodman v. Jeditjah Lodge*, 67 Md. 117. One or more members of a voluntary association may sue for the benefit of all to enforce a right of the association, where the members are so numerous that it is impracticable to bring them all before the court: *Liggett v. Ladd*, 17 Or. 89. And an action is maintainable by the duly elected treasurer of such an association, who sues on behalf of himself and the other members of the association, except the defendant, the former treasurer of the association, to compel him to pay over trust funds belonging to the association, which should be in the custody of its treasurer, and which the defendant has refused to pay over on demand: *Gieske v. Anderson*, 77 Cal. 247. The majority of a voluntary association cannot annul or change its constitution, or bring it over to a new rival organization, differing from it in material respects, and a vote to that effect, or having that object, is void: *McFadden v. Murphy*, 149 Mass. 341. The title to church property of a divided congregation is in that part that is acting in harmony with its own law; and the ecclesiastical laws, usages and customs, and principles which were accepted among them before the dispute began are the standards for determining which party is right: *McRoberts v. Moudy*, 19 Mo. App. 26. The civil courts never take up matters of religious doctrines for the purpose of determining the abstract truth or falsity thereof; and they never consider them at all, except where civil rights, rights of property, or contract respecting the holding, control, use, or enjoyment of property, are dependent on them: *East Norway Lake Church v. Halvorson*, 42 Minn. 503. When property is held by a religious society in trust for its members, none of the members, though they constitute a majority, have any right or power to divert the property to the use of another and different church organization: *Baker v. Ducker*, 79 Cal. 365. See also *Brown v. Monroe*, 80 Ky. 443; *Hackney v. Vanster*, 39 Kan. 615.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

**TERRE HAUTE AND INDIANAPOLIS RAILROAD COM-
PANY v. CLEM.**

[122 INDIANA, 15.]

RAILROADS— NEGLIGENCE IN REGARD TO CROSSINGS.— It is the duty of a railroad to so construct and maintain its crossings that they may be safely used by persons traveling the highway; and for the negligent breach of this duty it must answer in damages to one injured thereby while exercising ordinary care.

RAILROADS.— PRESUMPTION OF NEGLIGENCE which prevails against the company in cases of injuries to passengers while on a train does not prevail in actions for injuries received at railroad crossings.

NEGLECTENCE.— EVIDENCE OF REPAIRS MADE after an injury has been sustained is incompetent to show antecedent negligence on the part of a railroad company.

RAILROADS—DUTY AS TO CROSSINGS.— Due but not extraordinary care is all that is required of railroads in regard to keeping their crossings in a safe condition for travel; and in case of accident, the question whether due care was or was not used must be determined by the precedent facts and attendant circumstances, and not from what subsequently occurs.

W. H. Russel, F. F. Moore, J. G. Williams, and S. O. Bayless,
for the appellant.

L. D. Boyd and L. G. Beck, for the appellee.

ELLIOTT, J. The appellee recovered a judgment for damages for an injury to a horse which he was driving. The theory of the appellee is, that the appellant was negligent in constructing a crossing at a point where its railroad crossed a public road, and that the injury to his horse was caused by the appellant's negligent breach of duty.

It is quite well settled that it is the duty of a railroad cor-

poration to so construct and maintain its crossings that they may be safely used by persons traveling the highway, and that for a negligent breach of this duty it must answer in damages to one who exercises ordinary care and sustains an injury from the breach of duty by the company: *Evansville etc. R. R. Co. v. Crist*, 116 Ind. 446; 9 Am. St. Rep. 865; *Evansville etc. R. R. Co. v. Carvener*, 113 Ind. 51; *Indianapolis etc. R. R. Co. v. Stout*, 53 Ind. 143.

The appellee's counsel are in error in assuming that the same rule applies to actions for the recovery of injuries received at a crossing that applies in cases where passengers are injured while on the trains of the carrier. The presumption of negligence which prevails in such cases does not obtain in such a case as this; and the cases of *Cleveland etc. R. R. Co. v. Newell*, 104 Ind. 264, 54 Am. Rep. 312, and *Terre Haute etc. R. R. Co. v. Buck*, 96 Ind. 347, 49 Am. Rep. 168, are not in point.

The evidence upon the question of negligence in this instance is not of that satisfactory character which authorizes us to declare that the judgment should be affirmed, although incompetent evidence was admitted. If, therefore, we find that incompetent evidence was permitted to go to the jury over the objection of the defendant, we must reverse the judgment.

The appellee was permitted to prove that after the accident occurred the appellant changed and repaired the crossing. This was error. Evidence of repairs made after an injury has been sustained is incompetent to show antecedent negligence. This question was carefully considered by the supreme court of Minnesota in the case of *Morse v. Minneapolis etc. R'y Co.*, 30 Minn. 465, and three of the earlier decisions of that court were overruled. In the course of the opinion in that case it was said: "But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason, given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The

more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem to be unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." The authorities are collected and discussed in the case of *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47, and it was there said: "The fact that an accident has happened, and some person has been injured, immediately puts a party on a higher plane of diligence and duty from which he acts with a view of preventing the possibility of a similar accident, which should operate to commend rather than condemn the person so acting. If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time." The question received consideration in the very recent case of *Hodges v. Percival*, 132 Ill. 53, and in the course of the discussion the court said: "The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence, but the exercise of such increased diligence ought not, necessarily, to be regarded as tantamount to a confession of past neglect." The rule asserted in the cases from which we have quoted is declared in many other cases: *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; *Dale v. Delaware etc. R. R. Co.*, 73 N. Y. 468; *Salters v. President etc. Canal Co.*, 3 Hun, 338; *Payne v. Troy etc. R. R. Co.*, 9 Hun, 526; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692; *Ely v. St. Louis etc. R'y Co.*, 77 Mo. 34.

The rule stated and enforced in the cases referred to is the only one that can be defended on principle. To declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents. The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs he does it under penalty; for if the evidence is competent, it operates as a confession that he was guilty of a prior wrong. If it is com-

petent, then it would be the duty of the court to charge the jury that they must regard the making of subsequent repairs as evidence of antecedent negligence; and this, certainly, would violate settled principles, for it is what occurs prior to the action, and not what happened afterwards, that determines whether there has or has not been a culpable breach of duty. If, for example, the owner of a mill or factory repairs or improves it after an accident has happened, so as to prevent the possibility of future accidents, the just inference is, not that he was previously guilty of negligence, but that, prompted by humane motives, and influenced by the new information supplied by the fact that an accident has happened, he has exerted extraordinary care, and taken such precautionary measures as render it impossible that any one should be injured in the future. It is unjustly reversing the presumptions to hold that such owner improves or repairs because he was, at some time anterior to the time of making the improvements or repairs, guilty of an actionable wrong. True policy and sound reason require that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrong-doers. A rule which so operates as to deter men from profiting by experience, and availing themselves of new information, has nothing to commend it; for it is neither expedient nor just.

Accidents do happen, despite the utmost care and diligence; but with very rare exceptions, the happening of an accident does not of itself supply grounds for inferring negligence. It is common knowledge that accidents occur which even the highest degree of care can neither anticipate nor prevent; but in cases where an extraordinary accident happens, which ordinary prudence could not have foreseen or anticipated, neither a natural nor an artificial person is liable: *Wabash etc. R'y Co. v. Locke*, 112 Ind. 404; 2 Am. St. Rep. 193.

The law does not, as a general rule, require any one to exercise extraordinary care or vigilance.

The question in this case, and in all others like it, is, whether the defendant, prior to the accident, used due care; and whether due care was or was not used must be determined by the precedent facts and attendant circumstances, not from what subsequently occurs. If a person does all that is reasonable under the facts as they exist and are known at the time of the injury, or at some antecedent time, he is not

a wrong-doer; for no one is bound to anticipate and provide against unusual and unexpected accidents. In *Lane v. Atlantic Works*, 111 Mass. 136, it was said: "The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which arise." Events may cast their shadows before so as to render an act wrong, but they cannot cast them backward over an act not wrong when it was performed, and make it a tortious one.

The fact that the happening of an accident may convey information producing a conviction or belief that had extraordinary precaution been taken the injury would have been prevented does not legitimately tend to prove that ordinary care and vigilance were not exercised. All may be done that ordinary care required, and yet a person, satisfied by experience that a higher degree of care may insure absolute safety, may employ extraordinary means to prevent accidents in the future. In doing this, he does what is commendable; and certainly he ought not to be restrained or checked by the fear that if he does resort to unusual means to insure safety, he may be treated as one who confesses that he was a wrong-doer when the accident occurred. It is unjustly burdening one who, influenced by the light supplied by events, resorts to greater precautions to insure the safety of others.

The incidental remark made in the case of *City of Goshen v. England*, 119 Ind. 368, cannot be considered as an authoritative affirmation of the right to adduce evidence of subsequent repairs to prove precedent negligence.

Judgment reversed, with instructions to award a new trial.

EVIDENCE OF REPAIRS AFTER ACCIDENT AS PROOF OF PRIOR NEGLIGENCE. — In view of the fact that this topic has received elaborate discussion in the principal case, and has already formed the basis of an extended note to *St. Louis etc. R'y Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176-183, it is not our intention here to enter into an exhaustive analysis of the cases, but rather to show the prevailing rule as announced in the late authorities.

Notwithstanding the fact that there has been some conflict in the adjudications on this subject, it is now well settled, both by the weight of authority as well as by sound reasoning, that evidence of repairs or improvements made subsequently to the happening of an accident in which a personal injury is received, is incompetent, and inadmissible to show antecedent negligence.

In addition to the authorities cited in the principal case, may be mentioned as maintaining the rule, *Woodbury v. City of Oronoso*, 64 Mich. 239; *Gulf, Colorado etc. R'y Co. v. McGowan*, 73 Tex. 355; *Missouri Pacific R'y Co. v. Hennessy*, 75 Tex. 155; *St. Louis etc. R'y Co. v. Jones*, decided by the Texas supreme court May 6, 1890, and not yet reported; *Colorado Electric Light*

Co. v. Lubbers, 11 Col. 505; 7 Am. St. Rep. 255; *Lang v. Sanger*, 76 Wis. 71. In *Missouri Pacific R'y Co. v. Hennessy*, 75 Tex. 155, the court said: "Before we dismiss the subject, it would be proper to add that evidence of improvement in the appliances and mode of operating a railroad after an accident should not be received as evidence of former negligence. For this reason, the evidence that defendant, two or three days after the injury to plaintiff, put up a light at the crossing was inadmissible. It would be a bad rule that would discourage improvements on and in the use of the road." In *St. Louis etc. R'y Co. v. Jones*, *supra*, the court decided, in an action against a railroad company for injuries to an employee caused by a plank falling on him from a pile-driver, that evidence that after the injuries were received the plank was fastened in place, so that it could be moved without falling, was not admissible to show negligence on the part of the company; that the principle involved was sacred, and the law of the state, for the reason that improvement should not be discouraged. In *Gulf, Colorado etc. R'y Co. v. McGowan*, 73 Tex. 355, the court ruled that in a suit for damages against a railroad for the overflow of lands caused by a railway track, evidence was inadmissible against the company to show that in reconstructing the track after the overflow, the culverts were improved in construction and capacity, and the court, in disposing of that case cited and quoted a previous case as follows: "In this court in the case of the *Texas Pacific R'y Co. v. Burns*, it was held that such evidence was improper, Watts, J., saying: 'As a general rule, upon principle as well as matter of public policy, such evidence ought not to be admitted. It is a matter of common knowledge that railroad tracks and machinery, as well as all other instrumentalities used in operating trains, are continually undergoing repairs and being improved. Undoubtedly the public is greatly interested in the continuance of such improvements. Where accidents have directed the attention of the company to a particular portion of the road-bed or other instrumentality that by additional safeguards would be rendered more safe, to hold, as a general rule, that if the desired improvement is made, that the company thereby admits that it had been negligent would result in deterring the company from promptly making the desired improvement. Indeed it would be a harsh rule if every change for the better is to be considered as evidence showing former negligence': 4 Texas Law Rev. 54-56; *Morse v. Railway Co.*, 30 Minn. 465."

In a suit against a city to recover for injuries received from the improper construction of a bridge which the city failed to keep in repair, the court refused to admit evidence to show in what manner the city repaired the bridge after the injury and accident occurred: *Woodbury v. City of Owasco*, 64 Mich. 239. So in *Lang v. Sanger*, 76 Wis. 71, the court declared the rule to be, that, evidence, in an action for injuries received through the alleged dangerous condition of a gang-plank in defendant's saw-mill, that such defendant after the accident made repairs is inadmissible, even in rebuttal of testimony that the repairs were made before the accident.

The liability of the master must be determined by what took place at and before the accident. What he did afterwards by way of precaution to avoid future accidents cannot be construed into an admission by him of previous neglect of duty. Therefore, in an action for damages, evidence that, after the accident causing the injury, the master put up warnings to employees not to engage in certain work after a certain hour without first notifying his officers in charge is inadmissible: *Colorado Electric Co. v. Lubbers*, 11 Col. 505; 7 Am. St. Rep. 255.

In the case of *Hodges v. Percival*, 132 Ill. 53, the rule and the reasons

therefor received careful consideration in an action against the owner of a passenger-elevator to recover for personal injuries from negligence in its construction and operation. The court said: "The admission of the testimony that an air-cushion was put in the elevator-shaft after the happening of the accident is the only ground for reversal which is presented to our attention by appellant's counsel. We think that the testimony was improper, and should have been excluded. Evidence of precautions taken after an accident is apt to be interpreted by a jury as an admission of negligence. The question of negligence should be determined by what occurred before and at the time of the accident, and not by what is done after it. New measures or new devices adopted after an accident do not necessarily imply that all previous devices or measures were insufficient. A person operating a passenger-elevator is bound to avail himself of all new inventions and improvements known to him which will contribute materially to the safety of his passengers, whenever the utility of such improvements has been thoroughly tested and demonstrated, and their adoption is within his power, so as to be reasonably practicable. For this reason it was proper to show that a valuable device for securing safety was known to the defendant, and its use neglected by him, before the accident; but it would seem unjust that he could not take additional precautions after the accident without having his acts construed into an admission of prior negligence. Persons to whose negligence accidents may be attributed will hesitate about adopting such changes as will prevent the recurrence of similar accidents, if they are thereby to be charged with an admission of their responsibility for the past. The happening of an accident may inspire a party with greater diligence to prevent a repetition of a similar occurrence; but the exercise of such increased diligence ought not necessarily to be regarded as tantamount to a confession of past neglect. We are aware that there is a conflict of authority upon this subject. In Pennsylvania, evidence of precautions taken after the accident has been held competent: *Pennsylvania R. R. Co. v. Henderson*, 51 Pa. St. 315; *Westchester etc. R. R. Co. v. McElhove*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218. But it has been held that such evidence is not admissible in New York, Connecticut, Iowa, and Minnesota: *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1; *Baird v. Daly*, 68 N. Y. 547; 15 Am. Rep. 488; *Salter v. Delaware etc. Canal Co.*, 3 Hun, 338; *Payne v. Troy etc. R. R. Co.*, 9 Hun, 526; *Morrell v. Peck*, 24 Hun, 37; *Cramer v. City of Burlington*, 45 Iowa, 627; *Hudson v. Chicago etc. R. R. Co.*, 59 Iowa, 581; 44 Am. Rep. 692; *Morse v. Minneapolis etc. R'y Co.*, 30 Minn. 465; *Nalley v. Hartford Carpet Co.*, 51 Conn. 524; 50 Am. Rep. 47. In the last case the supreme court of Connecticut reviewed the cases in the other states, and, in deciding against the admissibility of such testimony, used the following language: 'If the subsequent act is made to reflect back upon the prior one, although it is done upon the theory that it is a mere admission, yet it virtually introduces into the transaction a new element and test of negligence which has no business there, not being in existence at the time.' Black, in his work on proof and pleadings in accident cases, page 37, section 30, announces as the result of his examination of the authorities, that 'precautions taken after an accident are not, in general, admissible for the purpose of showing prior negligence.'"

In addition to the Pennsylvania cases cited in the above quotation, and which maintain a contrary doctrine to that therein set forth, we may add that the same rule prevails in Kansas. The cases in that state, as well as the Pennsylvania cases and others on both sides of the question, are collected in

St. Louis etc. R'y Co. v. Weaver, 35 Kan. 412; 57 Am. Rep. 176, and in the note thereto the cases are discussed and the conclusion drawn that evidence of repairs made after an accident is never admissible to show prior neglect. We think that it has been shown that there can be no doubt about the correctness of this rule. It is supported by the best of reasons, as well as by the great weight of authority, and by all of the later decisions involving the question, without exception, so far as we have been able to ascertain.

RAILROADS — CROSSINGS — NEGLIGENCE. — When a railroad company assumes to maintain a crossing over its track for the use of the traveling public, it must use due care to keep it in a safe condition, and is liable for injuries resulting from the negligent construction thereof: *Missouri P. R'y Co. v. Bridges*, 74 Tex. 520; 15 Am. St. Rep. 856, and note; *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617, and note; *Fenny v. Long Island R. R. Co.*, 116 N. Y. 375.

CITY OF BLOOMINGTON v. SMITH.

[123 INDIANA, 41.]

MUNICIPAL CORPORATIONS — RECOVERY ON LOST BONDS OF. — An action may be maintained against a city to recover the amount due on overdue lost negotiable bonds issued by it, if, after maturity, the owner demanded payment in due form, and offered approved indemnity to the city against loss on account of inability to present or return the bonds for cancellation.

MUNICIPAL CORPORATIONS — BONDS OF, WHERE PAYABLE. — Municipal bonds drawn payable to bearer are negotiable as inland bills of exchange, and are payable at maturity only on presentation at the office of the city treasurer, or at the place where made payable. If lost before maturity, the owner may maintain an action to recover the amount due, after demand and offer of indemnity to the city against loss.

CONTRACTS — RELIEF AGAINST UNANTICIPATED ACCIDENT. — Where an unanticipated accident occurs not provided for when the contract was made, and which leaves one of the parties remediless in a court of law, equity may be invoked to give relief.

J. B. Mulky, R. W. Miers, and E. Corr, for the appellant.

J. H. Loudon and W. P. Rogers, for the appellees.

MITCHELL, C. J. The city of Bloomington, on the first day of January, 1881, issued bonds to the amount of thirty-two thousand dollars for the purpose of funding the indebtedness of the city. Three of the bonds thus issued, of the denomination of one hundred dollars each, were delivered and made payable to Isabella Smith, or bearer. It is averred in the complaint that while the bonds were held and owned by Mrs. Smith they were lost, and that after they became due and payable she demanded payment of the amount due, and

offered to indemnify the city against loss on account of her inability to present or return the bonds for cancellation, but that the city refused to accept any indemnity, or to pay the bonds. The death of Mrs. Smith is averred, and the complaint contains such other averments as entitle the plaintiffs to sue as her heirs. They brought into court an approved bond for the indemnity of the city, and asked and obtained judgment for the amount of the bonds and interest.

The position of the city is, that municipal bonds drawn payable to bearer are negotiable as inland bills of exchange, and are therefore only payable after they are due, upon presentation at the office of the city treasurer, or at the place where they are made payable.

For the purposes of this case it may be conceded that the proposition above stated is correct, and that the bonds in question were governed by the law merchant: *Board etc. v. Bright*, 18 Ind. 93; *New Albany etc. Co. v. Smith*, 23 Ind. 353; *Gardner v. Haney*, 86 Ind. 17.

It is an old and familiar rule that although the holder of a bill payable to bearer could not recover in a court of law without showing the presentation of the identical paper, a court of chancery, upon proof that the bill had been lost or stolen, would order it paid upon equitable terms. Thus it is said by a learned author: "A court of equity, however, may, where the bill is asserted to be lost, give relief to the holder; but then it is always upon the terms that he shows satisfactory proofs to establish the loss, and gives good security for the repayment of the money if the acceptor shall be compelled to pay the same again to another holder": *Story on Bills of Exchange*, secs. 447, 448; *Depew v. Wheelan*, 6 Blackf. 485. The rule which requires indemnity is not applicable in case the loss occurs after maturity: *Elliott v. Woodward*, 18 Ind. 183; *National State Bank v. Ringel*, 51 Ind. 393; *Gregg v. Union Co. etc. Bank*, 87 Ind. 238.

The agreement of an acceptor or payor of a bill of exchange is, that upon a date fixed he will pay, upon presentment of the identical bill. He has the right to insist upon the condition, but the power of a court of equity to compel payment upon suitable indemnity is thoroughly established: *Savannah Nat. Bank v. Haskins*, 101 Mass. 370; 3 Am. Rep. 373.

When an accident occurs which was not anticipated and provided for when the contract was made, and which leaves one of the parties remediless in a court of law, the jurisdic-

tion of a court of equity may then be invoked to give relief against the accident: Daniel on Negotiable Instruments, secs. 1477, 1478; Randolph on Commercial Paper, sec. 1696; *Adams v. Edmunds*, 55 Vt. 352.

It would be against conscience that the maker should escape payment of an honest debt, notwithstanding satisfactory proof that the bill had been lost or stolen, and hence could not be presented, and notwithstanding the holder had tendered adequate indemnity: *Fales v. Russell*, 16 Pick. 315; *Thayer v. King*, 15 Ohio, 242; 45 Am. Dec. 571; *Smith v. Rockwell*, 2 Hill, 482; *Snyder v. Wolfley*, 8 Serg. & R. 328.

There was no error. The judgment is affirmed, with costs.

RECOVERY ON LOST BONDS. — Equity has jurisdiction to give relief in cases of lost bonds: *Carter v. Jones*, 5 Ired. Eq. 196; 49 Am. Dec. 425. And the loss of a bond is no objection to its being paid, where indemnity is offered against its being enforced in the hands of another: *Miller v. Rutland etc. R. R. Co.*, 40 Vt. 399; 94 Am. Dec. 414. A lost bond may, in equity, be set up to charge either a surety or an heir of the obligor: *Kerney v. Kerney*, 6 Leigh, 478; 29 Am. Dec. 213, and note.

BORN v. FIRST NATIONAL BANK OF INDIANAPOLIS.

[123 INDIANA, 78.]

CHECKS — CERTIFICATION OF, BY HOLDER. — The drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. It thus becomes, in his hands, a certificate of deposit, and by his own act he makes the bank his debtor, and releases the drawer.

CHECKS — THE CERTIFICATION OF A CHECK, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank certifying it becomes bound. Beyond this nothing is added to the legal force or effect of the instrument.

CHECKS — LIABILITY OF PARTY ACCEPTING CERTIFIED CHECK. — One who accepts a certified check in the usual course of business is not bound to risk the solvency of the bank upon which it is drawn. He is bound only to promptly and seasonably present it for payment.

CHECK — CERTIFICATION — ACCEPTANCE OF, AS PAYMENT. — The acceptance of a certified check instead of money, in the absence of an express agreement, only dispenses with the necessity of payment in the legal mode, and implies that the check is a payment only in the event that it is honored on presentation.

CHECKS — CERTIFIED CHECK AS PAYMENT. — To make the acceptance of a certified check operate as an absolute payment, there must be an agreement, express or implied, that it shall be regarded as money.

CHECKS — CERTIFICATION DOES NOT RELEASE DRAWER. — The mere certification of a check does not insure the solvency of the bank upon which

it is drawn. Therefore one who takes such check in the ordinary course of business does not assume the risk of the solvency of such bank, but the drawer who selects for himself the bank which he will trust with his money assumes the risk of its solvency.

CHECKS — CERTIFIED CHECK AS PAYMENT. — The acceptance of a certified check does not, of its own force and vigor, operate as payment, nor *ipso facto* release the drawer, and impose upon the creditor the risk of the solvency of the bank certifying it.

J. E. McDonald, J. M. Butler, A. H. Snow, J. M. Butler, Jr., J. A. Pritchard, and H. T. Tincher, for the appellant.

R. Hill, for the appellee.

ELLIOTT, J. On the thirtieth day of January, 1886, the appellant was indebted to the appellee, and after twelve o'clock, noon, of that day, he delivered to it a certified check drawn by him on Ritzinger's bank, in which bank he then had money on deposit. The banks of the city of Indianapolis had a long-established rule requiring all checks presented after twelve o'clock, noon, to be certified by the bank upon which they were drawn, and it was the well-known custom of such banks to immediately charge the checks certified by them against the depositor. This was done in this instance, and the amount of the check was set aside for the purpose of paying it. Ritzinger's bank suspended payment, and made a voluntary assignment for the benefit of creditors prior to the business hours of the first day after the check was delivered to the appellee.

We agree with the appellant's counsel that the drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes, in his hands, substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is, that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor. *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708; *Thomson v. Bank etc.*, 82 N. Y. 1; *Girard Bank v. Bank of Penn Township*, 39 Pa. St. 92; 80 Am. Dec. 507; *Freund v. Importers' etc. Bank*, 76 N. Y. 352. It is true that the bank by which the check is certified becomes bound for its payment, and that it cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit: *Espy v. Bank of Cincinnati*, 18 Wall. 604. But it is

very clear that the authorities to which we have referred do not directly rule this case, for here the holder did not procure the certification of the check; all that it did was to accept the check in the ordinary course of business. Nor do we regard this case as within the sweep of the reasoning of the courts in the cases to which reference has been made. Here the holder accepted the check as it was offered, and did nothing to make the drawee its debtor. The principle which gives force and strength to the decisions referred to fails entirely where there is no act done by the holder of the check save that of receiving it in the form in which it is presented; for the element which sustains those decisions is, that the holder, by procuring the certification of the check after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer. It is, in such a case, the holder's own act that changes the relation and situation of the parties.

The certification of a check does not completely change its character; on the contrary, it changes it only in one particular, although the change, it is true, does produce a difference in the relation of the original parties, inasmuch as the drawee ceases to be the debtor of the drawer for the amount represented by the check. But this is the extent of the change in the situation of the respective parties in all cases where the certification is not procured by the holder of the check after it passes into his hands. It remains an order for the payment of money, and the certification, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank that certifies it becomes bound; but beyond this nothing is added to the legal force or effect of the instrument, except, as we have said, in cases where the holder himself procures its certification.

The party who accepts a certified check in the usual course of business is not bound to take the risk of the solvency of the bank upon which it is drawn. He is bound only to do what the law requires, and that is, to promptly and seasonably present the check for payment. A party to whom a debt is owing has a right to demand payment of his claim in money; for, in the absence of an express agreement, payment can only be made in money: *Hancock v. Yaden*, 121 Ind. 366; 16 Am. St. Rep. 396. In accepting a check instead of money, the creditor dispenses with the necessity of payment in the legal mode, and the reasonable implication is, that the check shall be a payment only in the event that it is honored on presentation.

To hold otherwise would, as the supreme court of the United States has suggested, seriously interfere with commercial and financial transactions, and break down an established system: *Merchants' Bank v. State Bank*, 10 Wall. 604. Nor is there any rule of law which requires it to be so held; the analogies are, indeed, the other way, for as only money is payment where there is no express agreement, there is no sufficient reason for inferring that an order for money, although accepted, is money, or has the same effect as money.

A bank upon which a check is drawn is not liable upon the check unless it is certified as good: *Harrison v. Wright*, 100 Ind. 515; 58 Am. Rep. 805. The certification fixes the liability of the bank, but it does no more. It does not change the situation of the party who takes the check, nor does it make the check money. As it is not money, but is simply an accepted order for money, it does not, of its own force and vigor, operate as money. It cannot take the place of money without an express agreement to that effect, and therefore cannot, by its own intrinsic force, operate as payment. To make it a payment, something must be added, and that something must be an agreement, express or implied, that it shall be regarded as money,—the legal medium of payment.

The obvious purpose of certifying checks is to assure the persons to whom they are offered that they are genuine, and will be paid; not that the bank that certifies them is solvent. There is nothing in the nature of the transaction that suggests, in the faintest degree, that certification is evidence of the solvency and ability of the drawee. It is perfectly clear that the certification of a check means simply that the bank upon which it is drawn will honor it, and there is no reason for implying that one who receives it in the usual course of business does so upon the faith that the certification implies that the bank is both willing and able to pay it. The certification is not intended to convey information as to the solvency of the bank; none of the parties can be regarded as giving it that force; and if not, then it cannot be inferred that any of them agreed that the certification of the check impressed it with the character of money. We suppose that no one who accepts a certified check gives a thought to the question of the solvency of the bank upon which it is drawn, other than such as he would give if there were no certification; for it would be unnatural and unreasonable to do so, inasmuch as the certification is, in terms and in implication, no more than an agreement

that the check will be paid on presentation. It neither represents nor touches the question of the solvency of the bank upon which it is drawn. There is therefore no just reason for concluding that the party who takes a certified check in the ordinary course of business assumes the risk of the solvency of the bank chosen by the drawer of the check as his place of deposit. The fair and reasonable implication is, that the party who selects for himself the bank which he will trust with his money assumes the risk of its solvency.

The certification of a check is not intended to convey to the person to whom it is offered an assurance that the bank upon which it is drawn is solvent; for there is nothing in the nature of the transaction, nor in the form of the contract, which authorizes the inference that any of the parties expected or intended that it should have that effect. It cannot therefore be implied that the acceptance of the check by the creditor *ipso facto* released the drawer, and imposed upon the creditor the risk of the solvency of the bank by which the check was certified.

It is, and long has been, settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities. Accepting, as we must, this rule as obligatory, we cannot conclude that a certified check constitutes payment, unless we assume that the certification makes it the equivalent of money as a medium of payment. But neither in principle nor authority is there to be found warrant for this assumption, for, as we have seen, the nature of a check is not changed by certification, except in the one particular already indicated. As there is no other change, it is logically impossible that the effect of that change can make the check the equivalent of money.

From whatever point of view the question is examined, it appears clear that there is no release of the drawer of the check, unless there is either an express or an implied agreement to that effect.

There is scant authority upon the direct question. The reason for this barrenness is, that the use of certified checks is of modern origin. But scarce as the authorities are, our conclusion that a certified check does not, of its own force and vigor, operate as a payment, is not without support from the decided cases. In *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436, it was expressly decided that a certified check does not constitute payment. To the same effect are the de-

cisions in *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933; 26 Am. Rep. 126; *Andrews v. German Nat. Bank*, 9 Heisk. 211; 24 Am. Rep. 300. The question received consideration in the recent case of *Larsen v. Breene*, 12 Col. 480, and it was held that a certified check was not a payment. This general doctrine is asserted by Mr. Tiedeman, who says: "And the same rule applies, although the check had been certified before its delivery to the payee or holder; the certification only having the effect in that case of increasing its currency by adding the liability of the bank to that of the drawer": Tiedeman on Commercial Paper, sec. 456.

There was no substitution of one debtor for another in this instance, and the contention of appellant's counsel that there was a novation cannot prevail. The delivery of the check was simply a conditional payment. The release of the original debtor was dependent upon the condition that the check should be honored on presentation. He still remained the debtor; for he was bound for the debt as long as the check remained unpaid: *Culver v. Marks*, 122 Ind. 554; 17 Am. St. Rep. 377.

Judgment affirmed.

CHECKS — CERTIFICATION BY DRAWER AT REQUEST OF HOLDER. — Where the holder of a check procures it to be certified, this operates as a payment of the debt for which the check was drawn, and the drawer is released from liability: *French v. Irwin*, 4 Baxt. 401; 27 Am. Rep. 769; *First Nat. Bank v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708. *Contra*, see *Andrews v. German Nat. Bank*, 9 Heisk. 211; 24 Am. Rep. 300.

CERTIFIED CHECKS. — As to the liability of the drawer and drawee, respectively, upon certified checks, see note to *Bickford v. First Nat. Bank*, 89 Am. Dec. 442, 443. A certification of a check by the bank upon which it is drawn makes the check irrevocable by the drawer; but an affirmative answer by the bank that a check is good does not, of itself, amount to a certification of it: *Kahn v. Walton*, 46 Ohio St. 195. The payee of a check is liable upon his indorsement, after it has been presented to the drawee, and protested for non-payment, even though the indorsee or holder, before accepting it, had been assured by the drawee that it was good: *Bank v. Carter*, 88 Tenn. 279.

PAYMENT — CHECKS. — Payment by check is conditional, not absolute: *Good v. Singleton*, 39 Minn. 340; unless there is an express agreement to the effect that the payment shall be absolute: *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15. If the check is dishonored, the drawer must pay it, as the original debt is thereby revived; *Henry v. Conley*, 48 Ark. 267; and this is true where the check is certified, as well as where it is not: *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436; *Larsen v. Breene*, 12 Col. 480.

KELLER v. STATE.

[128 INDIANA, 110.]

CRIMINAL LAW.—PROSECUTION IS NOT BOUND TO CALL WITNESSES at the request of the accused. If the latter requires their testimony, he must call them himself.

W. P. Denny, for the appellant.

L. T. Michener, attorney-general, and *J. H. Gillett*, for the state.

ELLIOTT, J. The evidence disclosed the fact that Josephine Freeman was a witness to important acts which preceeded and were directly connected with the offense of assault and battery of which the appellant was convicted. The appellant moved the court to compel the state to call and examine her as a witness, and showed that her presence as a witness could readily be secured. The trial court denied the motion, and upon this ruling arises the only question which the record presents.

Under the rigorous and harsh rules of the old common law, there was reason for compelling the prosecution to call and examine as witnesses all persons who had knowledge of material facts connected with the crime charged against an accused person. That law denied him counsel and sealed his lips as a witness. Our law not only allows him to employ counsel, but employs counsel for him when he is too poor to employ counsel himself. Our law makes him a witness in his own behalf, and affords him liberal facilities for obtaining witnesses. The reason which supported the common-law rule compelling the crown to call witnesses utterly fails under our system, and where the reason fails, so, also, does the rule. If the question were an open one we should decline to follow the ancient rule of the English courts, since the reason which was its life does not exist in our state.

The question is not an open one. Our court has not only held that the prosecution is not bound to call witnesses at the instance of the accused, but it has gone further; for it has held that an accused can only cross-examine the witnesses of the state as to matters brought out on the examination in chief. If the accused desires to elicit new matter, he must make the witness his own. In *Haymond v. Saucer*, 84 Ind. 3, it was said: "The failure to produce a witness who might as well be called by one party as the other is no reason for indulging a presumption against either party." A similar doctrine was asserted in *Coleman v. State*, 111 Ind. 563. But we need not

invoke the aid of analogous cases, for we have a decision directly in point. We refer to the case of *Winsett v. State*, 57 Ind. 26, where it was said, in answer to the appellant's contention that it was the duty of the state's attorney to produce all the witnesses to the transaction, that "we may remark, however, that the law of this state, in our opinion, imposes no such duty on the state's attorney." The decision of our court is sustained by well-reasoned cases: *State v. Martin*, 2 Ired. 101, 120; *State v. Smallwood*, 75 N. C. 104; *State v. Kilgore*, 70 Mo. 546; *State v. Eaton*, 75 Mo. 586.

It is proper to say that at common law all felonies were punishable capitally at the time the rule to which we have referred was adopted, and that the rule was held not to apply in prosecutions for misdemeanors. In the case of *United States v. Butler*, 1 Hughes C. C. 457, 466, Chief Justice Waite, who presided at the trial, said, in answer to a request of the counsel of the defendants to compel the prosecutor to name the witnesses, that "there was no practice justifying such a demand." We think this is clearly correct under our laws in all cases.

We do not mean to intimate that it is the right or the duty of a prosecutor to conceal the names of witnesses from the accused, or in any way to hinder him in obtaining material and relevant testimony; on the contrary, we believe that it is the duty of the officer representing the state to refrain from doing any act that will deprive the accused of a fair trial. The state does not desire that any citizen shall be deprived of evidence tending to exhibit the truth, and its officers will be guilty of an unpardonable breach of duty if they corruptly conceal or suppress evidence of a material and relevant character. But it by no means follows from this that the prosecuting attorney must, at the dictation of the accused, call such witnesses as he names. If he desires the testimony of the witnesses, he must call them; all he has a right to ask is, that the prosecuting attorney shall refrain from doing anything that will tend to deprive him of testimony to which he is rightfully entitled.

Judgment affirmed.

CRIMINAL LAW — CALLING WITNESSES. — The prosecution must, ordinarily, introduce all the witnesses actually present at the time of the commission of the offense: *Selph v. State*, 22 Fla. 537; but the Michigan rule is, that the state need not call every possible witness, where the evidence is merely cumulative: *Bonker v. People*, 37 Mich. 4; *People v. Goldberg*, 39 Mich. 545. But the prosecution is never justifiable in calling only such witnesses as are favorable to the prosecution, when there are others equally cognizant of the facts of the case: *People v. Etter*, 81 Mich. 570.

CITIZENS' LOAN FUND AND SAVINGS ASSOCIATION v. FRIEDLEY.

[128 INDIANA, 148.]

ATTORNEY AND CLIENT — SKILL AND DILIGENCE REQUIRED OF ATTORNEY. —

Attorneys are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and others who hold themselves out to the world as possessing skill and qualifications in their respective trades and professions.

ATTORNEY AND CLIENT — LIABILITY OF ATTORNEY. —

An attorney who undertakes the management of business committed to his charge does not insure absolute success, but impliedly represents that he possesses the skill and will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession; and he will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession.

ATTORNEY AND CLIENT — LIABILITY OF ATTORNEY. —

An attorney is liable for the consequences of ignorance or non-observance of the rules of practice of his court, or want of care in the preparation of the case for trial; but he is not liable for an error of judgment upon points of new occurrence, or of nice or doubtful construction.

ATTORNEY AND CLIENT — LIABILITY OF ATTORNEY. —

An attorney is liable for negligence who is ignorant of the ordinary and settled rules of pleading and practice, and of the statutes and published decisions of his own state; but he is not liable where he accepts as true and correct law a decision of the court of last resort of such state; nor is he liable for a mistake in reference to a matter in which the members of his profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled by such court; nor is he liable if mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers.

ATTORNEY AND CLIENT — LIABILITY OF ATTORNEY. —

An attorney is not liable for a mistake in advice given prior to the publication of a decision of the court of last resort in his own state establishing a contrary rule.

J. H. Loudon and W. P. Rogers, for the appellant.

J. W. Buskirk, P. K. Buskirk, and H. C. Duncan, for the appellees.

MITCHELL, C. J. This suit was instituted by the Citizens' Loan Fund and Savings Association against Harmon H. Friedley and the sureties on this bond to recover money alleged to have been lost to the loan association on account of the negligence and want of skill of the defendant Friedley while acting as the attorney of the association.

It is averred that the association made a loan of four hundred dollars to one of its share-holders in August, 1883, upon the faith of advice given by the appellee, its attorney, who certified to its officers, in writing, that the title to certain real estate upon which the applicant for the loan proposed to execute a mortgage as security therefor was perfect, and available to secure the loan applied for.

It appears that the real estate was owned by the applicant and his wife as tenants by the entireties; that the loan was made in reliance upon the advice of the attorney; that the borrower subsequently died, his estate being insolvent; and that his widow successfully resisted a suit for the foreclosure of the mortgage, subsequently brought by the association, her defense having been predicated upon the ground that she signed the note and mortgage merely as the surety for her husband.

It is insisted that the complaint shows that the association sustained loss in consequence of the ignorance, carelessness, or unskillfulness of its attorney, and that the latter, with his sureties, must therefore respond to it in damages for the amount lost. No neglect or want of skill appears, except that the attorney was mistaken as to the law applicable to the state of the title of the borrower, and its availability as a security for the loan.

Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions: *Waugh v. Shunk*, 20 Pa. St. 130.

The practice of law is not merely an art; it is a science which demands from all who engage in it, without detriment to the public, special qualifications, which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science; there is no attainable degree of skill or excellence at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible. "That part of the profession," said Lord Mansfield in *Pitt v. Yalden*, 4 Burr. 2060, "which is carried on by attorneys, is liberal and reputable, as well as useful to

the public, when they conduct themselves with honor and integrity; and they ought to be protected where they act to the best of their knowledge and skill. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover for his client": *Watson v. Muirhead*, 57 Pa. St. 161; 98 Am. Dec. 213; *United States Mortgage Co. v. Henderson*, 111 Ind. 24, 34.

An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill and that he will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken. He will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession: *Hillegass v. Bender*, 78 Ind. 225, and cases cited; *Pennington v. Yell*, 11 Ark. 212; 52 Am. Dec. 262; *Goodman v. Walker*, 30 Ala. 482; 68 Am. Dec. 134; *Weeks on Attorneys*, secs. 284-289; *Fenaille v. Coudert*, 44 N. J. L. 286; *Gambert v. Hart*, 44 Cal. 542.

Thus it has been said: "He is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial; whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction": *Godefroy v. Dalton*, 6 Bing. 460; *Chitty on Contracts*, 817; *Dearborn v. Dearborn*, 15 Mass. 316. It is his own fault, however, if he undertakes without knowing what he needs only to use diligence to find out, or applies less than the occasion requires.

A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own state; but he is not to be charged with negligence where he accepts as a correct exposition of the law a decision of the supreme court of his own state; nor can he be held liable for a mistake in reference to a matter in which members of the profession possessed of rea-

sonable skill and knowledge may differ as to the law until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers: *Marsh v. Whitmore*, 21 Wall. 178; *Kemp v. Burt*, 4 Barn. & Adol. 424.

Now, while it is quite true that section 5119 of the Revised Statutes of 1881, which took effect September 19, 1881, prohibited a married woman from entering into any contract of suretyship, and declared all such contracts void as to her, and while it had been thoroughly settled that a married woman who had joined in a mortgage of her separate property to secure the debt of her husband was to be regarded as his surety (*Leary v. Shaffer*, 79 Ind. 567), it had never been held prior to the twenty-third day of January, 1884, when the judgment in *Dodge v. Kinzy*, 101 Ind. 102, was pronounced, that a mortgage executed by a husband and wife on lands held by them as tenants by entireties was void as to both of them. It cannot fairly be said, therefore, that before the decision in *Dodge v. Kinzy*, 101 Ind. 102, was made and promulgated, so as to have become known by those reasonably diligent in the profession, it was such a mistake to advise that a husband and wife might secure a debt of the former on his estate in lands held by himself and wife as tenants by the entireties as could only have resulted from the want of ordinary knowledge and skill, or from the failure to exercise reasonable care and caution. The error must be regarded as one into which any reasonably careful and prudent lawyer might have fallen, and therefore one for which the attorney was not liable.

The judgment is affirmed, with costs.

ATTORNEY AND CLIENT. — As to the skill and diligence required of attorneys in transacting the business of their clients, see *Babbitt v. Bumpus*, 73 Mich. 331; 16 Am. St. Rep. 585, and note.

GEISS v. FRANKLIN INSURANCE COMPANY.

[128 INDIANA, 172.]

INSURANCE — INDIVISIBILITY OF POLICY. — Where property covered by insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same fire, then, even though separate amounts of insurance are apportioned to each separate item or class of property, if the consideration for the contract and the risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner.

INSURANCE — INDIVISIBILITY OF POLICY — UNINTENTIONAL FAILURE TO STATE TRUE TITLE. — Where the validity of insurance is made to depend upon the assured being the absolute and unconditional owner of the true title to the property insured, a failure to set forth the true title with substantial accuracy renders the policy void, not only as to the property the title to which is not truly represented, but as to all other property covered by the same policy and subject to the same risk; and this even though the owner had no intention to deceive.

NEW TRIAL. — WHEN MOTION FOR NEW TRIAL HAS BEEN MADE, entertained, and granted by the court, it is too late to object that the motion was not seasonably made.

F. P. Leonard, for the appellant.

A. L. Roach and G. V. Menzies, for the appellee.

MITCHELL, C. J. Geiss sued the Franklin Insurance Company to recover the amount of loss alleged to have resulted to him from the destruction of certain personal property, which had been insured against loss by fire, under a policy issued to the plaintiff by the above-named insurance company. By the terms of the policy the company stipulated, for a gross sum, to insure separate and distinct articles and kinds of property, all contained in the same building, for certain specific and distinct sums, the whole aggregating one thousand dollars. One of the articles covered by the policy was a soda-fountain, which was insured separately for the sum of \$350. Smaller sums were distributed over other classes of property. The policy contained a stipulation to the effect that in case the assured was not the sole, absolute, and unconditional owner of the property insured, the policy should be void. Before taking out the policy the assured had purchased the soda-fountain therein mentioned, and the appurtenances thereto, from a manufacturer in Boston, and had given his notes for the purchase price, in each of which it was stipulated, in effect, that the title to the property should be and remain in the seller until the notes for the purchase price were all fully paid. The notes had all fallen due, and about half of them had been

paid when the fire occurred which destroyed the soda-fountain, as well as all the other property covered by the policy.

The foregoing facts having appeared in evidence, together with the further fact that the assured was not aware of the legal effect of the stipulations contained in the notes, so far as it affected the ownership of the property, or until he had taken professional advice after the fire, the court instructed the jury to return a verdict for the defendant.

It is conceded that the assured was not the sole, absolute, and unconditional owner of the soda-fountain and apparatus connected therewith. It follows, as a matter of course, that, as applied to that item of property, the policy was void: *Carpenter v. German-American Ins. Co.*, 52 Hun, 249. The question is, Can it be upheld as respects the other separate and distinct classes of property?

In *Havens v. Home Ins. Co.*, 111 Ind. 90, the conclusion was reached that where property covered by a policy of insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same conflagration, then, even though separate amounts of insurance be apportioned to each separate item or class of property, if the considerations for the contract and the risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner. See also *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and note 400-405; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291.

The aggregate amount of the policy in the present case was one thousand dollars. This was apportioned in different amounts, over six distinct and separate items or classes of property, more than one third of the whole amount being upon the soda-fountain, to which the assured had only a conditional right. It was all exposed to one risk, and the consideration for the policy was a specified sum. The court cannot say that the insurance company would have insured the soda-fountain if the true state of the title thereto had been disclosed, nor can we say that it would have insured the other items or classes of property without insuring the soda-fountain. The contract was entire and indivisible, and to hold the company liable would be to enforce upon it an obligation which it never entered into. This would be to make an agreement for the parties, rather than to enforce the liability of one of them upon an agreement made by the parties themselves.

We fully appreciate the unfortunate situation of the assured, but courts of law cannot be made asylums in which every person who has made a mistake can take refuge against his own contract deliberately entered into. Where the validity of the insurance is made to depend upon the assured being the absolute and unconditional owner of the true title of the property insured, a failure to set forth the title with substantial accuracy renders the policy void, not only as to the property the title to which is not truly represented, but all other property covered by the same policy and subject to the same risk. This is so, even though the owner had no intention to deceive: *Wilbur v. Bowditch etc. Ins. Co.*, 10 Cush. 446; May on Insurance, sec. 287. This rule has no application, however, in case it appears that the agent of the insurance company who consummated the contract and issued the policy was informed or knew of the true state of the title or ownership of the property: *National Mut. Fire Ins. Co. v. Barnes*, 41 Kan. 161; *Crescent Ins. Co. v. Camp*, Tex., Oct. 19, 1888.

There had been a former trial of this cause, and a general verdict for the plaintiff. The defendant thereupon moved the court for judgment, notwithstanding the general verdict. This was overruled. Afterwards, the court granted a new trial, on the defendant's motion. The appellant now insists that the motion for a new trial came too late; that the right to move for a new trial was waived by moving for judgment notwithstanding the general verdict. The argument is, that this latter motion was, in effect, a motion in arrest of judgment. We are not required to determine the effect of the first motion upon the right of the defendant to move for a new trial, inasmuch as there does not appear to have been any objection at the time to the motion for a new trial. Where a motion for a new trial has been made and entertained by the court, it is too late, after a new trial has been granted, to object that the motion was not seasonably made: *Sweetser v. McCrea*, 97 Ind. 404; *Northcutt v. Buckles*, 60 Ind. 577; *Wilson v. Vance*, 55 Ind. 394; *Hill v. Hazen*, 93 Ind. 109; *Trentman v. Swartzell*, 85 Ind. 443; *American White Bronze Co. v. Clark*, 123 Ind. 230.

The judgment is affirmed, with costs.

FIRE INSURANCE—INDIVISIBILITY OF POLICY.—Where a building and articles contained in it, such as furniture, were insured for one gross premium, although in separate amounts, the contract of insurance must be treated as entire; and is wholly avoided by a breach as to either part: *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689, and the numerous authorities therein collected.

WITTY v. MICHIGAN MUTUAL LIFE INSURANCE CO.

[123 INDIANA, 411.]

NEGOTIABLE INSTRUMENTS — OMISSION OF NUMBER OF DOLLARS IN BODY OF NOTE — MARGINAL FIGURES. — In a written obligation, in form a negotiable promissory note, in which there is a promise to pay "dollars," but the number of dollars in the body of the instrument is blank, and the margin of the instrument contains a superscription which states the number of dollars, the figures found in the margin should be taken as the amount which the obligor intended to obligate himself to pay.

CONTRACTS — SUFFICIENCY OF, NOTWITHSTANDING IMPERFECTIONS. — Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the court to ascertain the terms and conditions on which the parties intended to bind themselves.

T. Hanna, for the appellant.

H. Speed, for the appellee.

BERKSHIRE, J. This was an action brought by the appellee against the appellant on the following writing: —

"\$147.70. INDIANAPOLIS, IND., Nov. 28, 1883.

"Four months after date, I promise to pay to the order of the Michigan Mutual Life Insurance Company — dollars —, and five per cent attorney fees thereon per annum from date until paid, value received, without relief from valuation or appraisal laws of the state of Indiana. The indorsers jointly and severally waive presentment for payment, protest, and notice of protest and non-payment, of this note, and expressly agree, jointly and severally, that the holder may renew or extend the time of payment hereof from time to time, and receive interest in advance or otherwise from either of the makers or indorsers for any extension so made, without releasing them hereon.

"Negotiable and payable at —.

J. B. WITTY.

"Mar. 28, 31, '84, Indiana."

The appellee, in its complaint, did not ask for a reformation of the instrument, but relied on it as a promissory note complete in itself.

The appellant answered by the general denial only.

The cause was submitted to the court at special term, and a finding made for the appellee. The appellant filed a motion for a new trial, which the court overruled, and he excepted.

An appeal was taken to general term, and upon the errors assigned, the judgment at special term was affirmed, and from the judgment in general term this appeal is prosecuted.

There is but one question presented for our consideration. Is the written instrument, as it appears in the record, an enforceable obligation? We are of the opinion that it is, if not so otherwise, by virtue of section 5501 of the Revised Statutes of 1881, and is negotiable by indorsement.

It is signed by the appellant, and when taken as an entirety, we think it contains a promise to pay \$147.70, together with five per cent attorney's fees. By the very terms of the instrument the appellant obligates himself to pay to the appellee "dollars," and it is expressly recited that this promise rests upon a valuable consideration. No one can read the writing without at once coming to the conclusion that the appellant intended to obligate himself to the appellee for the payment of some definite amount of money, and that the appellee understood that it was receiving such an obligation.

Though there may be some formal imperfections in a written obligation or contract which parties have entered into, if it contains matter sufficient to enable the court to ascertain the terms and conditions of the obligation or contract to which the parties intended to bind themselves, it is sufficient. In the language of Lord Campbell in *Warrington v. Early*, 2 El. & B. 763: "The effect of a written contract is to be collected from all within the four corners of the document"; and no part of what appears there is to be excluded. We can imagine no good reason why the marginal figures upon the writing in question should be disregarded.

We know as a part of the commercial history of the country that the universal practice has been for a period so long, that the memory of man runneth not to the contrary, to represent by superscription in figures upon all obligations for the payment of money the amount or sum which is written in the body of the instrument. The superscription is always intended to represent the amount found in the body of the instrument, and not a different amount; if, therefore, an obligation is found where there is a promise to pay "dollars," but the number of dollars in the body of the instrument is blank, and the margin of the instrument is found to contain a superscription which states the number of dollars, why, in view of the usage or custom which has so long prevailed, should the body of the instrument not be aided by the superscription? We think, in such a case, the figures found in the margin should be taken as the amount which the obligor intended to

obligate himself to pay, and the obligation enforced accordingly. We do not think, in such a case, that the courts would be justified in disregarding the evident intention of the parties as indicated by the superscription upon the paper, and in holding the instrument void for uncertainty, or on the ground that it is not a perfect writing. And especially are we of the opinion stated, in view of the liberal statute which we have on the subject of promissory notes and other written obligations and their negotiation: R. S. 1881, sec. 5501.

In the case under consideration the action is between the original parties to the instrument, and upon it in the form and condition in which it was executed, and therefore we do not think it would be profitable to consider questions which might arise where the obligation is made payable at a bank, the blank number of dollars afterwards filled in by the payee and indorsed by him to an innocent holder for value before maturity. As to whether the writing would be a negotiable instrument in its present condition but for our statute, we find some conflict of authority. We cite the following authorities for and against the proposition:—

For, — *Ives v. Farmers' Bank*, 2 Allen, 236; *Sweetser v. French*, 13 Met. 262; *Petty v. Fleishel*, 31 Tex. 169; 98 Am. Dec. 524; *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286; *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478.

Against, — *Norwich Bank v. Hyde*, 13 Conn. 279; *Edwards on Bills*, 168; *Hollen v. Davis*, 59 Iowa, 444; 44 Am. Rep. 688, and note.

We find no error in the record. The judgment is affirmed, with costs.

PROMISSORY NOTES — STATING THE AMOUNT. — Notes should express the sum for which they are given in the body of the instrument; but an omission of the sum will not be fatal or render the note invalid if the true amount can be gathered from other parts of the writing: *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478. A defect existing in the amount stated in the body of a note, the figures upon the margin may be referred to for the purpose of removing any ambiguity, or even to supply the amount, which has been wholly omitted in the body of the instrument: *Williamson v. Smith*, 1 Cold. 1; 78 Am. Dec. 478; *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286; *Petty v. Fleishel*, 31 Tex. 169; 98 Am. Dec. 524. But the contrary rule is laid down in *Hollen v. Davis*, 59 Iowa, 444, 44 Am. Rep. 688, where it was held that there could be no recovery at law upon an instrument in the form of a promissory note, but stating no amount in the body of the note, even though figures are set forth in the margin.

PENNSYLVANIA COMPANY v. MARION.

[123 INDIANA, 415.]

RAILROADS — DUTY TO KEEP PLATFORMS IN REPAIR. — Railway companies are bound to keep the platforms of their passenger stations in a safe condition for persons to enter and leave the cars. A failure to do so is a neglect of duty for which the company is liable to persons injured, without fault on their part, on account of such defective platform.

CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM MOVING TRAIN IS QUESTION OF FACT. — Whether or not a person who voluntarily alights from a moving railway train is guilty of negligence, is a question of fact to be determined by the jury, taking into consideration all the circumstances in connection with the alighting.

EVIDENCE — MATTERS OF OPINION. — In an action to recover for injuries arising from an attempt to alight from a moving train, plaintiff may testify as to the effort made to prevent himself from falling, as this embodies a mere statement of fact, and not a conclusion or opinion.

WITNESS — COMPETENCY OF PHYSICIAN — PRIVILEGED COMMUNICATION. — In an action to recover for injuries received in attempting to alight from a moving train, the physician who dressed plaintiff's injuries is incompetent to testify to the conversation which occurred between them at that time relative to the manner in which the injuries were sustained. Such conversation is a privileged communication.

WITNESS — INADMISSIBLE EVIDENCE TO IMPEACH. — The bill of exceptions taken in a former trial containing the testimony then given by a witness is inadmissible for the purpose of impeaching him or contradicting his evidence given upon another trial of the same case.

RAILROADS — DUTY TO KEEP PLATFORM IN REPAIR — NEGLIGENCE. — Where a railroad company has allowed its passenger platform to become and to remain out of repair, so that it can only be used by careful attention to its structure, and if inattention to its actual condition imperils the safety of passengers, the railroad company is guilty of negligence in knowingly suffering it to remain in such condition.

RAILROADS — DEFECTIVE PLATFORM — DUTY OF PASSENGER. — Although a passenger may have previously known of the defective condition of a railroad platform, he is not bound to keep such knowledge actually in mind; and if at the time of stepping from a train upon such platform he knows of its condition, still he is not required to abandon its use, and seek some other place of approaching or leaving the train; and if in so using it, as he is invited to do by the company, and exercising proper care proportioned to the apparent condition of the platform, he is injured by reason of its defects, he is not guilty of contributory negligence so as to bar a recovery for the injury sustained through the negligence of the company.

S. O. Pickens, for the appellant.

J. C. Robinson and I. H. Fowler, for the appellee.

OLDS, J. This was an action brought by the appellee against the appellant to recover damages sustained by the appellee, alleged to have resulted by reason of the negligence of the appellant.

On the sixth day of December, 1882, the appellee was a passenger in the caboose of one of appellant's freight trains from Gosport to Mundy's station. When the train arrived at the latter station, the place of appellee's destination, and while the train was slowing up to make the stop, and running at a very low rate of speed, the appellee stepped off the car onto the platform, the train not coming to a stop until after the caboose passed the platform. In stepping onto the platform the appellee fell, with his right arm under the car, and it was so badly crushed by the car wheels passing over it that it had to be amputated.

The appellant is charged with negligence in constructing and maintaining the platform in an unsafe and dangerous condition, wholly unfit and unsafe for use of passengers.

The appellant demurred to the complaint for want of facts, which demurrer was overruled, and exceptions taken.

Issue was joined by answer in denial, and a trial had, resulting in a verdict and judgment in favor of the appellee for three thousand dollars.

Appellant filed a motion for a new trial, which was overruled, and exceptions taken.

The rulings of the court on the demurrer to the complaint and motion for a new trial are assigned as error.

There was a former trial of the cause and an appeal to this court, and a reversal of the judgment: *Pennsylvania Co. v. Marion*, 104 Ind. 239.

It is conceded by counsel for appellant that the complaint is sufficient, and the alleged error in overruling the demurrer to the complaint is waived. The only error relied upon for the reversal of the judgment is the ruling of the court on the motion for a new trial. The principal ground urged against such ruling is, that the verdict is not sustained by sufficient evidence. This contention of the appellant is mainly on account of the fact that the evidence shows that the appellee stepped from the train while it was in motion, and this, it is contended, is negligence *per se*, and therefore it must be declared as a matter of law that the appellee was guilty of contributory negligence, and hence cannot recover.

It is important to consider what obligation rests upon the appellant in regard to the keeping of the platform at the station in repair, and this has been so fully considered in the recent decisions of this court that it is unnecessary to do more than refer to the decisions and quote briefly from them.

In *Louisville etc. R'y Co. v. Lucas*, 119 Ind. 583, at page 590, it is said: "The duty of a railway carrier does not end when it provides safe cars, engines, and appliances; for its duty extends so far as to require it to provide means for passengers to safely enter its cars at its stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations." It is further said: "It was the duty of the appellant to keep the platform which it used in conjunction with the Pennsylvania Company in a safe condition. The situation of the platform and the manner of its construction were such as to make it the duty of the appellant to see that it was safe; for it was bound to know that if it became unsafe the lives and limbs of its passengers were put in peril."

In the case of *Lucas v. Pennsylvania Co.*, 120 Ind. 205, 16 Am. St. Rep. 323, the following language from Bishop on Non-contract Law, section 1086, is quoted and approved: "The depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard to their comfort and safety. The approaches, the tracks around, the platforms and places for entering and leaving the cars, the passages to the cars, every spot likely to be visited by passengers seeking the depot, waiting at it for trains, or departing, should be made safe and kept so, and at reasonable times should be lighted. And passengers not in fault, injured through a neglect of this duty, may have compensation."

These decisions settle the law in this state, in accordance with the holding of other courts, that railway companies are bound to keep the platforms at their passenger stations in a safe condition for persons to enter and leave the cars, and a failure to do so is a neglect of duty which makes the company liable to persons injured without fault on their part on account of such defective platform.

The evidence clearly shows the platform, where the appellee stepped from the car, to be out of repair, and unfit and unsafe for use by passengers in getting on and off trains, and this is not seriously controverted, except to contend that it might have been worse.

We next consider the question of contributory negligence by the appellee in stepping from the train while in motion.

There was evidence from which the jury may have found that at the time the appellee stepped from the train the train was moving at a speed of not over two miles an hour, or at the speed of an ordinary or slow walk of a person, and that it

came to a stop about two car-lengths beyond the platform; that it was moving at that slow rate of speed, and was continuing to move past the platform, and the appellee came out upon the platform of the car, and stepped onto the lower step, and from there onto the platform at the station, in a careful manner, and as he stepped onto the platform his feet slipped, or he stumbled and fell, by reason of the condition of the platform; that the platform was uneven, some boards being higher than others, the boards warped, and the platform sunken in the center so that it was on a decline from the outer edge next to the track toward the center, but the point where the appellee alighted was more defective than some other parts of it. There was also evidence from which the jury may have properly found that appellee was unacquainted with the condition of the platform, and that the appellee was a man in full vigor and strength, and the place of alighting was on the platform of a public railway station, used to enter and depart from the cars run on appellant's railroad. Under this state of the evidence, the question as to whether or not the appellee was guilty of contributory negligence was a fact to be left to the jury to determine.

The question as to whether or not a person who voluntarily alights from a moving train is guilty of negligence or not was considered in the case of *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542, 12 Am. St. Rep. 443, and in that case it was held that whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting, and this, we think, is well supported by authorities which are considered and cited in that case. There was evidence to support the verdict.

Some other causes for a new trial are stated in the motion, and while they are not waived, as we understand counsel in their brief, they are not confidently relied upon for a reversal. The first in order is, appellee was asked by his counsel the following question: "In stepping off the train, what effort, if any, did you make to prevent yourself from falling?" Appellant objected, on the ground that the question called upon the witness to give a conclusion or opinion. The objection was overruled, and the witness made the following answer: "Well, I don't know; I had a hold with my left hand, and I stepped off careful, as careful as I could, and my feet kind of flew from

under me, and how I did fall, I can't exactly tell you how it did happen."

Appellant then moved to strike out from the answer the words "I stepped off careful, as careful as I could," and the court sustained the motion. The question called for the witness to state what he did, and not a conclusion or opinion, and the court struck out all that portion of the answer stating a conclusion or opinion of the witness.

The next error complained of is, sustaining an objection to cross-examining questions, propounded by appellant to appellee while a witness, in regard to whether or not he had drank intoxicating liquor at Gosport. The appellee had not been examined in chief as to what he did or where he was while at Gosport; but there is no available error in this ruling, as afterwards the appellee was called, and the appellant's counsel fully cross-examined him upon the same subject, interrogating him as to what he drank at Gosport.

The appellant called one Dr. Schill as a witness. The doctor had assisted in dressing the appellee's injuries, and while engaged in such professional duties he conversed with appellee, and the doctor was interrogated on the subject, and it was proposed to prove by him that he asked the appellee how the accident occurred, and that appellee answered that the company was not to blame for the accident; that he tried to get off the train before it stopped, and slipped off the step.

The objection was sustained to this evidence, on the grounds that the communication was privileged, and made to the doctor while engaged professionally in treating the appellee for the injury.

It is contended by appellant that this question was propounded, not to ascertain the nature of the injury, but to learn whether the appellee was to blame for the injury. In this ruling there was no error.

The case of *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409, and other decisions collected and cited in that opinion, are decisive of this question. The physician had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally, and such communications are privileged, and he cannot disclose them. If the physician took advantage of the fact of being called profes-

sionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received. The patient puts himself in the hands of his physician; he is not supposed to know what questions it is necessary to answer to put the physician in possession of such information as will enable the physician to properly treat his disease or injury, and it will be conclusively presumed that the physician will only interrogate his patient on such occasions as to such matters and facts as will enable him to properly and intelligently discharge his professional duty, and the patient may answer all questions propounded which in any way relate to the subject or to his former condition, with the assurance that such answers and communications are confidential, and cannot be disclosed without his consent.

One Parisho was called and testified as a witness for the appellee, and the appellant offered in evidence that portion of the bill of exceptions taken in the former trial of this cause containing the testimony given by the witness on the former trial, for the purpose of contradicting or impeaching the witness, and it was objected to, and the court sustained the objection, and the appellant contends that such ruling was error. This ruling was proper.

It is contended that the court erred in giving and refusing to give certain instructions. One question presented by the exceptions to the instructions relates to the appellee's leaving the train while in motion, it being contended by the counsel for appellant that in so doing the appellee was guilty of contributory negligence which barred his right to recover, and the appellant requested an instruction on this theory, and the court refused to give it, and gave an instruction submitting the question to the jury to determine whether under all the circumstances the appellee was guilty of contributory negligence in leaving the train at the time, place, and manner he did.

The instructions given by the court are in accordance with the rule as hereinbefore stated in passing upon the sufficiency of the evidence. The instructions given state the law on the subject, and the court properly refused those requested by the appellant.

It is further contended that the instructions given by the

court in relation to the duty of the appellant in keeping its platform in repair, and as to appellee's knowledge of the condition of the platform at the time of the injury, are erroneous, and instructions numbers 2 and 4 are particularly complained of in this respect. We do not deem it necessary to set out these instructions, as they must be considered and construed together with all the other instructions in the case relating to the same matter; and when the instructions are considered and construed together, they state the law to be, that a railroad company, in constructing a platform for the use of passengers in getting on and off trains at a public railway station, intrusts its use to the public, and impliedly represents and gives out to the public that it is reasonably safe and sufficient for such purpose, and it is its duty to make it so as that it may be used safely in approaching and leaving trains in any way in which passengers might reasonably and with reasonable care be expected to approach and leave trains; and that if the one at Mundy's, where appellee alighted, was not so constructed, or was allowed to become and remain out of repair, so that it could be used only by a careful attention to its structure, and if inattention as to its actual condition would imperil the safety of passengers, it would be insufficient, and the railroad company would be guilty of negligence in knowingly suffering and allowing it to remain in such condition; and that although the appellee may have previously known of its condition, he would not be bound to keep such knowledge actually in mind; and if at the time he stepped from the train upon it he knew of its condition, yet he would not be required to abandon the use of it, and seek some other place of approaching and leaving the train; and if he used care proportioned to the known danger, and was injured by reason of such defect, he would not be barred from recovery; and that it was for the jury to determine, from all the facts and circumstances, whether or not the appellee was guilty of negligence in leaving the train at the time, place, and manner in which he left it; if he was guilty of negligence in so leaving the train which contributed to the injury, he could not recover.

We think there was no error in these instructions. Certainly, under the authorities we have heretofore cited, the duty of the appellant in regard to the keeping of its platforms in repair is not too strongly stated against the appellant.

Railway companies are common carriers; they owe a duty to the public, and the public has the right to rely upon its

performance. The fact that a person may have seen a platform out of repair at one time does not bind him to carry such defect in mind upon all future occasions when approaching or leaving a train at that point. The platform is in constant use by the employees of the company. They are bound to take notice of its condition. The presumption is, not that such defect will be allowed to remain, but that the company will discharge its duty to the public, and repair the defect. If the defect were such as would naturally suggest to one of common understanding that it was dangerous, and place one in peril to pass over it to and from a train, and, with such knowledge, one voluntarily steps upon it, or having knowledge of such defect within such a short space of time previous that the company could not reasonably be expected to have repaired it, under such circumstances one may be regarded as not having used ordinary care, and having recklessly entered upon it at his own risk; but we have no such case as that under consideration. The railroad company stands in the position of saying to the public, Our platform is safe; and though it is not in such repair as the company is required to keep it, yet it is in common use by the public, and being so held out by the company, and used by the public, the appellee was not bound to abandon its use, and seek some other way of entering and leaving the cars; and if in using it, as he is invited to do by the company, he exercises proper care, proportioned to the apparent condition of the platform, in leaving the train, and is injured by reason of the defects, we do not think it can be said that he is guilty of contributory negligence, and cannot recover for the injury sustained by reason of the negligence of the company. We have a long line of decisions of this court which supports our conclusion, which hold that where there is a defect in a street, a person is not bound to abandon the use of the street; that he may travel upon the street, provided that it be not such a defect as renders the street impassable, or would suggest to one of common understanding that to attempt to pass it would put one in peril; and if in the use of the street he exercise care proportioned to the known danger, he may reasonably expect to shun or avoid the defect; and if in doing so he is injured, he can recover. These cases are collected and cited in the cases of *Town of Gosport v. Evans*, 112 Ind. 133; 2 Am. St. Rep. 164; *Brannen v. Kokomo etc. G. R. Co.*, 115 Ind. 115; 7 Am. St. Rep. 411; and *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827.

This disposes of all the questions presented. We think there is no error in the record.

Judgment affirmed, at costs of appellant.

RAILROAD COMPANIES—DUTY TO REPAIR PLATFORM. — Railroad companies, as carriers of passengers, must keep their stations and station grounds in repair, so as to allow persons to get on and off trains in safety: Note to *Lucas v. Pennsylvania Co.*, 16 Am. St. Rep. 325.

RAILROAD COMPANIES—NEGLIGENCE OF PASSENGER WHO JUMPS FROM A MOVING TRAIN. — Where a passenger is injured in attempting to leave the train while in motion, if evidence is given tending to show such circumstances, the question of the contributory negligence of the passenger is a fact for the jury to determine: Note to *Walker v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 426, 427.

PHYSICIANS—PRIVILEGED COMMUNICATIONS. — A physician may not testify to facts learned by him by inspecting and examining his patient, whether his knowledge is derived from mere observation or from words spoken by the patient: Extended note to *Thompson v. Ish*, 17 Am. St. Rep. 565-571.

CATLIN v. WILCOX SILVER PLATE COMPANY.

[128 INDIANA, 477.]

FOREIGN RECEIVER—RIGHTS AS AGAINST NON-RESIDENT ATTACHING CREDITORS. — The rights of non-resident attaching creditors are paramount in the courts of the state where the attachment is sued out, to those of a receiver who was appointed by the court of another state, and whose appointment antedates the issuance of the writ of attachment.

FOREIGN RECEIVER'S POWER IS ONLY CO-EXTENSIVE with that of the court appointing him, and while that court may authorize him to take possession of property in a foreign jurisdiction, the appointment can confer no legal power which he can exert over such property, without the aid of the court in whose jurisdiction it is found.

FOREIGN RECEIVER MAY INVOKE AID OF FOREIGN COURT in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who are parties to, or in some way in privity with, the proceedings in the course of which his appointment was made, or who are in the possession of the property or fund to which the receiver has a right, and not against creditors of a non-resident debtor, who are seeking to subject the property or funds to the payment of their debts, by proceedings duly instituted for that purpose.

FOREIGN RECEIVER HAS AUTHORITY ONLY CO-EXTENSIVE with the court appointing him, when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor, which the receiver has not reduced to possession.

FOREIGN RECEIVER—EFFECT OF INVOLUNTARY ASSIGNMENT TO. — An assignment to a receiver under compulsion of law is involuntary and ineffectual beyond the jurisdiction in which it is made, when in conflict with the interests of citizens in a foreign jurisdiction; and as against non-resident creditors in such jurisdiction, the assignment confers no

additional or higher right to property there situated than the receiver had by virtue of his appointment.

FOREIGN CREDITORS IN ATTACHMENT. — The rights of a foreign creditor against the property of the debtor within the jurisdiction are the same as those of resident creditors so far as respects proceedings in attachment and garnishment, in the absence of statute to the contrary.

L. A. Cole, for the appellant.

F. E. Osborn, W. B. Biddle, and J. H. Bradley, for the appellee.

MITCHELL, C. J. The question for decision arises upon the following facts: —

Clapp and Davies, partners, doing business in the city of Chicago, were indebted to certain judgment creditors residing in that city. They were also indebted to the Wilcox Silver Plate Company, and others who were residents of the state of Connecticut. At the same time Bagley and Oberreich, partners, residing and doing business at La Porte, Indiana, were indebted in a considerable sum to Clapp and Davies. One of the judgment creditors instituted proceedings in chancery against the latter firm by filing a creditor's bill in the superior court of Cook County. In aid of its jurisdiction in the proceeding thus instituted, the court appointed the appellant, Catlin, receiver, and by an order made on the fourteenth day of April, 1887, required Clapp and Davies to execute a general deed of assignment, transferring all their partnership property and effects to the receiver. Subsequently, in the month of June, the Wilcox Silver Plate Company instituted a suit in attachment, in the La Porte circuit court, against Clapp and Davies, and summoned Bagley and Oberreich to answer as garnishees. The other Connecticut creditors became parties to this last proceeding, under section 943 of the Revised Statutes of 1881. Thereupon Catlin, as receiver of the superior court of Cook County, intervened by leave of the La Porte circuit court, and asserted the right, in virtue of his appointment as receiver and the assignment made to him, to take and hold the debt due Clapp and Davies from Bagley and Oberreich.

The controversy, as will appear, involves the right to the fund in the hands of the garnishee defendants, and the question presented is, Are the rights of the non-resident attaching creditors paramount in the courts of this state to those of the receiver of the superior court of Cook County, whose appointment antedates the issuing of the writ of attachment? The

solution of the question depends upon the extent of power which a court of general jurisdiction sitting in one state can exert over property whose actual *situs* is within the jurisdiction of the courts of a foreign state.

A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court, whose jurisdiction may be aided, but in no wise enlarged or extended, by his appointment. His power is only co-extensive with that of the court which gives him his official character.

While it has been held that a court may appoint a receiver, and authorize him to take possession of property in a foreign jurisdiction, the doctrine is universal that the appointment confers no legal authority which the receiver can exert over the property without the aid of the courts in whose jurisdiction it is found. The appointment, of its own force, gives him the right to take possession of the property, but it confers upon him no power to compel the recognition of that right outside the jurisdiction of the court making the appointment: *High on Receivers*, secs. 47, 241. While there are authorities of great weight which seem to hold that a receiver appointed in one jurisdiction will not be permitted to maintain a suit in a foreign state, the generally prevailing doctrine upon which all the decisions seem to be harmonious is, that upon the principles of comity the courts of the jurisdiction in which the property or fund is situate will recognize the rights of the receiver so far as to aid him in reducing it to possession, unless to do so would in some way violate the local policy or interfere with the rights of resident creditors: *Metzner v. Bauer*, 98 Ind. 425, and cases cited; *Beach on Receivers*, secs. 16, 19, 682; *Bank v. McLeod*, 38 Ohio St. 174. But the recognition of well-established principles of comity and courtesy between courts of different jurisdictions is one thing; while the rights of resident or other attaching creditors who are seeking to avail themselves of legal proceedings authorized by statutes of the state for the appropriation of a fund belonging to a non-resident debtor must be determined upon altogether different principles. As has in effect been said, courts are prepared to extend comity where there is no reason to the contrary, especially if there is no interest of their own citizens, or of the citizens of another state who are asking the protection of their laws, injuriously affected by such recognition: *Paine v. Lester*, 44 Conn. 196; 26 Am. Rep. 442; *Milne v. Moreton*, 6 Binn. 353; 6 Am. Dec. 466.

The rule may be considered as established that a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties to, or in some way in privity with, the proceedings in the course of which his appointment was made, or who are in possession of the property or fund to which the receiver has a right, and not against creditors of a non-resident debtor who are seeking to subject the property or fund to the payment of their debts by proceedings duly instituted for that purpose.

Accordingly, in *Hurd v. City of Elizabeth*, 41 N. J. L. 1, the court said: "That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this state the assets of the debtor, is a proposition that appears to be asserted by all the decisions." The principle upon which the decisions rest is, that it is the policy of every government to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and hence the right of the receiver of a foreign court to sue, which is allowed only upon considerations of comity, will be denied when it comes in conflict with the interests of domestic creditors.

"We decline," said the court in *Runk v. St. John*, 29 Barb. 585, "to extend our wonted courtesy so far as to work detriment to citizens of our own state who had been induced to give credit to the foreign insolvent": *Bagby v. Atlantic etc. R. R. Co.*, 86 Pa. St. 291; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Thurston v. Rosenfield*, 42 Mo. 474; 97 Am. Dec. 351; *Willits v. Waite*, 25 N. Y. 577.

It follows, hence, that the available legal authority of a receiver is co-extensive only with the jurisdiction of the court by which he was appointed when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor which the receiver has not yet reduced to possession: *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Warren v. Union Nat. Bank*, 7 Phila. 156; *Booth v. Clark*, 17 How. 322; *State v. Jacksonville etc. R. R. Co.*, 15 Fla. 201; *Farmers' etc. Ins. Co. v. Needles*, 52 Mo. 17; *Taylor v. Columbian Ins. Co.*, 14 Allen, 353.

It is said, however, that as Clapp and Davies were residents of the state of Illinois at the time the receiver was appointed, the debt due them from Bagley and Oberreich was within the

jurisdiction of the superior court of Cook County, upon the principle that the domicile draws to it the personal property and choses in action of the owner, wherever they may be situate. Hence the contention is, that as the appointment of appellant as receiver was followed by a general deed of assignment, valid in the state of Illinois, it must be regarded as valid here, and as divesting Clapp and Davies of all title or interest in the debt in controversy after the date of the assignment.

It is of course well settled that personal property is transferable according to the law of the owner's domicile, and that a voluntary assignment or transfer, made without compulsion or legal coercion, is to be governed everywhere by that law, unless the contract by which the transfer was made is limited or restrained by some policy or positive enactment of the state in which the property is situate, or unless it affects citizens of the latter state injuriously: *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Martin v. Potter*, 11 Gray, 37; 71 Am. Dec. 689; *Weider v. Maddox*, 66 Tex. 372; 59 Am. Rep. 617; *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616; *Green v. Van Buskirk*, 7 Wall. 139; *Askew v. La Cygne Bank*, 83 Mo. 366; 53 Am. Rep. 590; *Law v. Mills*, 18 Pa. St. 185; Burrill on Assignments, 301; Story on Conflict of Laws, 383, 390.

"The voluntary transfer of a chattel by the debtor, if it be not forbidden in other respects by the law at the place of the *situs*, is to be as much regarded there, or elsewhere, as it would be at the place of the domicile": *Lowry v. Hall*, 2 Watts & S. 129; 38 Am. Dec. 495; *Smith's Appeal*, 104 Pa. St. 381; *Chaffee v. Fourth Nat. Bank*, 71 Me. 514; 36 Am. Rep. 345.

Such an assignment will not be upheld, however, if it contravenes the policy of the law of the place where the property is situate: *Guillander v. Howell*, 35 N. Y. 657; *Faulkner v. Hyman*, 142 Mass. 53; *Moore v. Church*, 70 Iowa, 208; 59 Am. Rep. 439; *In re Waite*, 99 N. Y. 433.

The principles above stated are applicable only to transfers or assignments of property which rest essentially on contract, and are voluntary in the sense that they are the product of a will acting without legal compulsion. Property in a foreign state that has passed from an assignor to an assignee by a voluntary deed, and not by proceedings *in invitum* by process of law, is distinguished from like property in the hands of a receiver by operation of law, or by an assignment made under legal compulsion. Assignments of the latter class are

held inoperative upon property not situate within the territory over which the laws that make or compel the debtor to make them have dominion: *Rhawn v. Pearce*, 110 Ill. 350; 51 Am. Rep. 691; *Smith's Appeal*, 104 Pa. St. 381; *Weider v. Maddox*, 66 Tex. 372; 59 Am. Rep. 617.

Involuntary assignments which are made under foreign insolvent laws have no operation outside of the state under whose laws they were made, while a voluntary assignment is a personal common-law right, possessed by every owner of property, and may operate in one state as well as another: *Walters v. Whillock*, 9 Fla. 86; 76 Am. Dec. 607.

Some conflict or contrariety of opinion may be found in the decisions in respect to what may or may not constitute a voluntary assignment under the statutes of different states, but it is unnecessary to enter upon a discussion of the cases relating to voluntary assignments, as all the authorities agree that where an assignment is made under compulsion of law, or where property is taken *ab invitum*, the transfer will not be regarded as voluntary, nor will it be effectual beyond the jurisdiction in which it was made, when it conflicts with the interests of citizens in a foreign jurisdiction. As we have seen, a court cannot extend its jurisdiction by the appointment of a receiver, so it is equally powerless to do so by coercing an assignment of the property in controversy. An assignment is regarded merely as a matter of convenience in aid of the jurisdiction of the court, the established doctrine being that as against non-resident creditors the assignment confers no additional or higher right to the property than the receiver had by virtue of his appointment: *Iddings v. Bruen*, 4 Sand. Ch. 239; *High on Receivers*, sec. 443.

While it is true, as has been remarked before, the domicile of the owner, in legal contemplation, draws to it his personal estate, wherever it may be, yet as this is so only by fiction of law, the rule is not of universal application. When by the laws and policy of the state where the property is actually located it is subject to the process of attachment or garnishment at the suit of a domestic or other creditor, the fiction yields, and the actual *situs* of the property determines whether or not it should be subjected to the process of the court: *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616; *Green v. Van Buskirk*, 7 Wall. 139. In cases of attachment and garnishment, like those for founding administration, the *situs* of a debt is the residence of the debtor: *United States v. Hal-*

stead, 109 U. S. 654; *Owen v. Miller*, 10 Ohio St. 136; 75 Am. Dec. 502.

It is said, however, that the principles of comity which control in aid of the receiver of a foreign court who is seeking to obtain possession of a fund should only be suspended in their operation in favor of domestic creditors, and that inasmuch as the attaching creditors in the present case are all non-residents of the state, the aid of the court should have been extended to the receiver and denied the creditors. While this position is not without support, it is not, in our view, maintainable.

Although non-residents, the attaching creditors are properly in our courts, pursuing a remedy which the statute confers upon foreign as well as domestic creditors. Until the legislature shall declare a different policy, the rights of a foreign creditor against the property of a debtor must be regarded by the courts as in all respects the same as those of resident creditors, so far as respects proceedings in attachment and garnishment. The rule which commends itself to our judgment is thus declared: "Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own state and that of another. Before the law and in its tribunals there can be no preference of one over the other": *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518; *Rhawn v. Pearce*, 110 Ill. 350; 51 Am. Rep. 691; *Warner v. Jaffray*, 96 N. Y. 248; 48 Am. Rep. 616; *Paine v. Lester*, 44 Conn. 196; 26 Am. Rep. 442. This rule governs the more recent decisions.

The conclusions above stated lead to an affirmance of the judgment.

Judgment affirmed, with costs.

FOREIGN RECEIVERS. — The legal authority of receivers duly appointed is co-extensive only with the jurisdiction of the court by whom they were appointed: *Sercomb v. Catlin*, 128 Ill. 556; 15 Am. St. Rep. 147; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592. A receiver appointed by the court of one state, for the benefit of the creditors there, can only sue in another state as such receiver on the ground of comity; and the principle of comity will not be so far extended as to sustain a suit by him to replevy property of the debtor which has been attached in the latter state by creditors residing therein, notwithstanding the fact that the property, when attached, was in the hands of the receiver: *Humphreys v. Hopkins*, 81 Cal. 551; 15 Am. St. Rep. 76.

KRAFT v. THOMAS.

[128 INDIANA, 512.]

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — DEMAND — RIGHT OF ACTION. — An instrument in writing, worded, "October 15, 1864. For value received of C. P. Coleman, three hundred dollar, in full, with use or bearer, waivin valuation and appraisement laws. Paid when kald for. Edward Kraft," — is a promissory note payable, generally, on demand, and on which a right of action exists without demand.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTE — DEMAND — STATUTE OF LIMITATIONS. — Where a promissory note is payable, generally, on demand, and on which a right of action accrues without demand, the statute of limitations runs against it from its date.

LIMITATIONS — NOTE ON WHICH DEMAND IS NECESSARY. — If a demand is a condition precedent to the right to sue, it must be made within a reasonable time, and that is, within the time limited by statute for the commencement of the action.

E. D. Hartman, for the appellant.

C. A. McClellan, for the appellee.

COFFEY, J. This was a suit by appellee against the appellant upon the following instrument of writing, viz.:—

"October 15, 1864.

"For value received of C. P. Coleman, three hundred dollar, in full, with use or bearer, waivin valuation and appraisement laws. Paid when kald for. **EDWARD KRAFT.**"

The complaint alleges that C. P. Coleman died testate on the fourth day of March, 1886, and that the appellee is his duly qualified executor; that after qualifying as such executor, he called upon the appellant and presented said note, and demanded payment thereof, and that the appellant promised to pay the same in a short time; that he has since failed and refused to pay the same, and that the same is due and remains unpaid.

To this complaint the appellant filed the following answer: "The defendant, Edward Kraft, for answer to the plaintiff's complaint, admits the execution of the instrument of writing sued on in this cause, but says that the cause of action set forth in the plaintiff's complaint did not accrue within twenty years before the death of the plaintiff's testate, said Conrad P. Coleman."

The court sustained a demurrer to this answer, and the appellant excepted.

The correctness of this ruling is the only question before us for consideration.

The appellee has not favored us with a brief in this cause, and we are not informed as to the ground upon which the court sustained the demurrer to this answer.

The instrument of writing set out with the complaint is a promissory note: *Long v. Straus*, 107 Ind. 94; 57 Am. Rep. 87; *Witty v. Michigan Mutual Life Ins. Co.*, 123 Ind. 411; *ante*, p. 327.

The complaint in the cause proceeds upon the theory that the note is of such a character that no action could be maintained upon it unless such action was preceded by a demand of payment.

The answer above set out proceeds upon the theory that an action could be maintained upon this note without a previous demand, or if a demand was a condition precedent to a right to sue, that unless such demand was made within the period of the statute of limitations, the right of action was barred.

This note is one payable generally, at no particular place, on demand. On such a note no demand is necessary before the commencement of an action to recover the amount thereof, the commencement of suit being a sufficient demand: *Bradfield v. McCormick*, 3 Blackf. 161; *Fankboner v. Fankboner*, 20 Ind. 62; *Burnham v. Allen*, 1 Gray, 496; *Mercer v. Patterson*, 41 Ind. 440.

A period of more than twenty-one years elapsed between the date of the note in suit and the death of the payee, so that if a right of action existed without a demand the right was barred at the time of the death of the testator; for the statute begins to run when the right of action accrues: *Wright v. Tichenor*, 104 Ind. 185; *Rous v. Walden*, 82 Ind. 238; *Ware v. State*, 74 Ind. 181.

But conceding that a demand was a condition precedent to the right to sue, still we think the right of action is barred, for the reason that the demand must be made within the period of limitation: *High v. Board etc.*, 92 Ind. 580; *Newsom v. Board etc.*, 103 Ind. 526.

In the case of *High v. Board etc.*, 92 Ind. 580, the authorities upon this subject are collected, and this court, after a careful consideration of them, said: "Although the cause of action did not accrue until a demand was made, yet the demand should have been made within a reasonable period from the time it might have been made. A reasonable time, in the absence of circumstances justifying or excusing a longer delay, is the time limited by statute for the commencement of the

action. If the rule was otherwise, a party, by his own act or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience, or pleasure to put it in motion."

Guided by these adjudications we are required to hold that the court erred in sustaining the demurrer to the answer now under consideration.

Judgment reversed, with directions to the circuit court to overrule the demurrer to the first paragraph of the appellant's answer, and for further proceedings not inconsistent with this opinion.

PROMISSORY NOTES — DEMAND.— A promissory note payable on demand is due immediately, without demand, and the statute of limitations commences to run at once from the time of its execution: *O'Neil v. Wagner*, 81 Cal. 631; 15 Am. St. Rep. 88, and note; but see *Seward v. Hayden*, 150 Mass. 158; 15 Am. St. Rep. 183. The payee of a demand note may sue the maker without any demand other than that made by the suit itself: *Cousins v. Partridge*, 79 Cal. 224; *O'Neil v. Wagner*, 81 Cal. 631; 15 Am. St. Rep. 88, and note; note to *Merritt v. Todd*, 80 Am. Dec. 250-254.

CASES
IN THE
SUPREME COURT
OF
IOWA.

RUSSELL & Co. v. MURDOCK.

[79 IOWA, 101.]

NEGOTIABLE INSTRUMENTS — NOTE MADE ON SUNDAY — RATIFICATION. — Although a note executed on Sunday is void, still a payment made on it on a secular day will be regarded as a ratification, and will make it valid from that day.

NEGOTIABLE INSTRUMENTS — RATIFICATION OF ILLEGAL NOTE BY PARTNER — ESTOPPEL. — One who alleges that he is the partner of another, who has ratified a void Sunday note by payment on a secular day, is estopped from denying the joint execution of the note, in order to effect the ratification.

NEGOTIABLE INSTRUMENTS — RATIFICATION OF ILLEGAL NOTE AND MORTGAGE BY JOINT MAKER. — The ratification of a void Sunday note and mortgage made to secure the same, by a payment made by one of the joint makers on a secular day, operates as a ratification of both instruments as to all of the joint makers.

SALE OF MACHINERY — WARRANTY — BREACH OF CONDITIONS. — Damages cannot be recovered by the buyer for a breach of warranty in the sale of machinery when he has failed to give notice of the failure of the machinery to fill the warranty within the time prescribed by the contract of sale, and has continued in its possession and use after the term prescribed for its return, especially when by the terms of the contract this operates as conclusive evidence of the fulfillment of the warranty to the satisfaction of the buyer.

SALE CONDITIONED UPON SETTLEMENT — RATIFICATION OF ILLEGAL NOTE. — Where a contract for the sale of machinery provides that the title thereto shall not pass until a settlement is concluded and accepted by the seller, a ratification of an illegal note and mortgage given for the purchase price, by a partial payment made thereon, is equivalent to the settlement contemplated, and upon such ratification the title passes to the purchaser, so as to enable the seller to maintain his action to recover the remainder of the purchase price.

FORECLOSURE of chattel mortgage. Judgment against two of three defendants without foreclosure. All parties appeal, the plaintiffs first.

Albert E. Clarke and G. H. Shellenberger, for the appellants.

J. W. Cory, for the appellees.

BECK, J. 1. The mortgage sought to be foreclosed was executed to secure certain promissory notes made by defendants in consideration of a separator and attachments and a traction steam-engine purchased by defendants from plaintiffs. The terms and conditions of the contract of purchase are expressed in an order for the property given by defendants, and addressed to plaintiffs. Among other conditions, the order contained the following: 1. The defendants agreed to execute, in security of the purchase-money, a chattel mortgage upon certain specified personal property; 2. It was stipulated "that title to the goods shall not pass until settlement is concluded and accepted by Russell & Co." 3. Other conditions are in the following language: "4. The above articles are warranted to be of good material, well made, and, with proper management, capable of doing as good work as similar articles of other manufactures. If said machinery, or any part thereof, shall fail to fill this warranty within ten days of first use, written notice shall be given to Russell & Co., Massillon, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity, and friendly assistance given to reach the machinery and remedy any defects. If the defective machinery cannot then be made to fill the warranty, it may be returned by the undersigned to the place where received, and another furnished on the same terms of warranty, or money and notes to the amount represented by the defective machine shall be returned, and no further claim made on Russell & Co. Continued possession or use of the machine after the time named above shall be conclusive evidence that the warranty has been fulfilled to the satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Co. under warranty. In case any casting fails through defect in its material during the first season, such defective piece shall be replaced without charge, except freight or express charges; but on any claim for replacement of defective castings, the defective pieces shall be returned to Russell & Co., or to the dealer through whom the ma-

chinery was ordered, and shall clearly show the defects. Defects or failure of one part shall not condemn or be grounds for claiming renewal or for the return of any other part. It is expressly agreed that this warranty shall not include levers, nor will any be replaced on account of breakage. All warranties to be invalid and void in case the machine is not settled for when delivered, or if this warranty is changed, whether by erasure, addition, or waiver."

2. It is shown by the evidence that the machinery was delivered to defendants upon this order on the nineteenth day of July, 1884, and that upon the next day, which was Sunday, the notes and mortgage in suit were executed. The evidence tends to show that the machinery did not comply with the warranty; but we find it unnecessary to find the facts upon this point, for reasons which will hereafter appear. The defendants, while claiming that the machinery did not comply with the warranty, did not return or offer to return it until the sixth day of January, 1888, more than two years after this action was commenced, and did not give written notice of failure of the machinery to comply with the warranty "within ten days of first use," as provided for by the conditions of the order set out above. They continued in possession and use of the machinery until long after suit was brought. The defendants, or one of them acting for the other, made payments upon the notes before suit was commenced. The defendant A. E. Murdock is the wife of her co-defendant J. H. Murdock. The defendants, in a certain notice, set out in the separate answers, describe themselves as constituting a copartnership.

3. A contract entered into on Sunday is void. But if the parties enforce or perform it on a secular day, they will be regarded as ratifying it, and will be estopped from denying its validity. It will be regarded as valid from the day of its ratification. The ratification takes the place of the execution, and the contract becomes valid by reason of the ratification. Payment upon a Sunday note is a ratification. If it be not so held, this result would follow: the payee would receive and hold money paid him without consideration. But by the act of payment the maker recognizes the note as valid, and assumes to perform its obligations. It becomes a valid obligation from that day, and is no longer void because it is a Sunday note: See *Harrison v. Colton*, 31 Iowa, 16.

4. It is insisted that A. E. Murdock, the wife of J. H. Mur-

dock, did not ratify the Sunday contract. It is claimed that she was not a partner of the other defendants, and therefore their act of payment upon the notes did not bind her as a ratification of the contract. But as she shows in her answer that she is a partner of her co-defendants, she will not now be permitted to deny it.

5. But if she be not a partner of the other defendants, she jointly with them entered into the contract for the purchase of the machinery, and she jointly executed with them the notes and mortgages. The payments were made upon the joint contracts, and she received the benefit thereof by the discharge and satisfaction of the debt to the extent of the payment. The payments will be presumed to have been made with her approbation, as they operate for her benefit, discharging the debt *pro tanto*, and therefore satisfying the claim based upon the original contract of purchase, on which she is liable if the notes and mortgage are held void as Sunday contracts.

6. The payment of a part of the debt, whether the payment was made and applied upon the notes or mortgage, is a ratification of both instruments. Both are but incidents of the debt, and the satisfaction of the debt will discharge both. So payment upon the debt will discharge *pro tanto* both instruments, and therefore operate as a ratification for both.

7. Defendants, on a counterclaim, seek to recover damages for the breach of warranty of the machinery found in their order. They did not give notice of the failure of the machinery to fill the warranty within the time prescribed in the contract, and continued its possession and use after the term for its return prescribed in the contract of the parties. This, by the terms of the contract, operates as conclusive evidence of the fulfillment of the warranty to the satisfaction of the defendants. This condition cannot be disregarded, but must be enforced. Under it the defendants can set up no claim for a breach of the warranty: *Bayliss v. Hennessey*, 54 Iowa, 11; *Wendall v. Osborne*, 63 Iowa, 100; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557.

8. A condition of the order above set out is to the effect that the title to the machinery shall not pass "until a settlement is concluded and accepted by defendant." We understand that the settlement contemplated pertains to the transaction upon the order, and the giving of notes and mortgage for the purchase-money. Counsel for defendants insist

that as the notes and mortgage were illegal because they were contracts made on Sunday, there was no "settlement" for the machinery, and title thereof remained in plaintiffs, and their only remedy is to recover the property, and they therefore cannot maintain this action to recover its price. The ready answer to this position is, that by the ratification of the Sunday contracts, they became valid, and were then the settlement contemplated, and thereupon the title of the property passed to defendants.

9. It is argued that the ratification of the notes and mortgage in effect ratified the settlement. This is doubtless correct. From this position counsel argue that defendant's claim for damages, on the ground of the breach of warranty, must be sustained. We fail to see any force in the argument. The warranty does not arise upon the notes and mortgage, the contracts ratified, but upon the order, the original contract of purchase. It was not a Sunday contract, and its validity was not affected by any other cause. It did not need ratification, and in fact was not ratified, but from the first was valid. As we have pointed out, defendants cannot recover damages because of the failure of the machinery to comply with the warranty, for the reason that they did not give the notice in the time prescribed in the contract, and retained possession of the property after it should have been returned, under the terms of the contract.

10. It is our conclusion that plaintiffs ought to recover against all the defendants upon the notes, that the mortgages in suit ought to be foreclosed, and that defendants cannot recover upon their counterclaims or cross-petition. The cause will be remanded to the court below for a decree in accord with these conclusions, or at the plaintiffs' election, such a decree will be entered in this court.

Modified and affirmed.

PROMISSORY NOTES — SUNDAY. — Promissory notes made on Sunday are void, unless they are subsequently ratified: *Booley v. McAllister*, 13 Ind. 565. A note made on Sunday, being invalid as between the parties, is not made valid by a subsequent promise to pay it: *Pope v. Linn*, 50 Me. 83. *Contra*, *Goss v. Whitney*, 27 Vt. 272. But where a note made on Sunday was given to an agent to be delivered to the payee, and the agent afterwards delivered it, it was decided that the maker, by subsequently promising to pay it, thereby ratified the note: *Clough v. Davis*, 9 N. H. 500.

CONTRACTS — SUNDAY. — As to the validity of contracts made on Sunday, and their subsequent ratification, see note to *Coleman v. Henderson*, 12 Am. Dec. 292-294.

PORTER v. POWELL.

[79 IOWA, 151.]

PARENT AND CHILD—DUTY OF PARENT TO SUPPORT MINOR CHILD. — It is the legal as well as the moral duty of parents to furnish necessary support to their children during minority; but a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same. Such promise may, however, be inferred on the grounds of the legal duty imposed.

PARENT AND CHILD — FATHER'S LIABILITY FOR MEDICAL SERVICES TO EMANCIPATED MINOR CHILD. — A father whose daughter is at service away from home, under a limited emancipation, and controlling her own wages, is liable for the services of a physician called by her during a dangerous illness, although such parent has not furnished nor agreed to furnish her with means of support during emancipation, nor known of, consented to, or procured the services of such physician. He is liable for the services as necessities furnished the daughter.

ACTION to recover the value of professional services. Judgment for plaintiff, and defendant appeals.

W. W. Cardell and R. S. Barr, for the appellant.

Parsons and Perry, and D. W. Wooden, for the appellee.

GIVEN, J. 1. Appellant's contention is, that the obligation of parents to support their minor children is only a moral one, and is not enforceable, in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont: See *Kelley v. Davis*, 49 N. H. 187; 6 Am. Rep. 499; *Farmington v. Jones*, 36 N. H. 271; *Gordon v. Potter*, 17 Vt. 348. A different doctrine has long since been held in this state. In *Dawson v. Dawson*, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In *Johnson v. Barnes*, 69 Iowa, 641, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court says: "As there was no promise, the question to be determined is, whether one can be inferred in favor of a wife who supports her child, as against her husband who has without cause abandoned her and his child. The obligation of parents to

support their children at common law is somewhat uncertain, ill-defined, and doubtful. Indeed, it has been said that there is no such obligation. . . . But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed." In *Van Valkinburgh v. Watson*, 13 Johns. 480, 7 Am. Dec. 395, it is said: "A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait's Actions and Defenses 50, the author says: "The duty of parents to support, protect, and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. . . . In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. . . . The legal obligation of parents in respect to support extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them." Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessaries furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, and that such promise may be inferred on the grounds of the legal duty imposed.

2. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld, the other may be withdrawn. Parents are entitled to the care, custody, control, and services of their children during minority. To emancipate is to release; to set free. It need

not be evidenced by any formal or required act. It may be proven by direct proof, or by circumstances. To free a child, for all the period of minority, from care, custody, control, and service, would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control, and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived. He frees his son of eighteen from services for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period, the parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts as are made with him for his services: *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *McCoy v. Huffman*, 8 Cow. 84; *Stiles v. Granville*, 6 Cush. 458; Schouler on Domestic Relations, sec. 267. There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation. The case of *Everett v. Sherfey*, 1 Iowa, 358, is relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The court says: "There could be no such harboring as would render the defendant liable to the father in this action, if the son was in truth emancipated; and if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By 'emancipation,' in this connection, we understand such act of the father as sets the son free from his subjection, and gives him the capacity of

managing his own affairs as if he was of age." The following is given as a condensed statement of the facts: "In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year, the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through willfulness or negligence, had not received the education proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places before he went into the defendant's service. After said December, 1851, the father did not, apparently, have or exercise the proper and necessary control and authority over the said minor that a parent of a well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts or received the pay is not stated nor proven. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the 11th of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing, also, therein that he would pay no debts of his contracting, and that he would not fulfill any contracts or pay debts entered into by him." The court says: "From these circumstances, to mention none others, we think the court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence, and a home. At least we think it so fairly deducible from the facts that we should not disturb the conclusion."

The circumstances disclosed in this case are these: The defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned, and controlled her own wages, and provided herself with clothing, her father consenting thereto, he not furnishing, or agreeing to furnish, her with any money or means of support; that while thus

absent, she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, from day to day, for a period of twenty-one days, which services were rendered without the procurement, knowledge, or consent of the defendant. These circumstances are widely different from those in *Everett v. Sherfey*, 1 Iowa, 358. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter; and no publication by the father notifying persons not to credit her on his account. The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity, or from a desire to teach their children to be industrious and self-supporting, emancipate them from service for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody, and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness, or accident—who, most of all others, need support—would not be entitled to it. Blackstone, in his commentaries (vol. 1, p. 446), says: "The duty of parents to provide for the maintenance of their children is a principle of natural law,—an obligation, says Puffendorf, laid on them, not only by Nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, so far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessities. What are necessities must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control, and services, with the duty to support.

8. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control, and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease, or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her. As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence. Our conclusion is, that the judgment of the district court should be affirmed.

BECK, J., dissented from the conclusion reached by the majority. In his opinion, the partial emancipation shown relieved the child of subjection to the parent, and bestowed upon her the capacity to manage her own affairs as if she were of age, and relieved the parent of all legal obligation for her support, under the rule that the parent is bound neither by the common law nor by statute to support his children who are of age; citing *Everett v. Sherfey*, 1 Iowa, 358; *Monroe County v. Teller*, 51 Iowa, 670; *Blachley v. Laba*, 63 Iowa, 22; Schouler on Domestic Relations, secs. 267, 268. The doctrines laid down in the majority opinion as to the liability of the father for the support of his minor child upon a promise express or implied, as well as upon other points of law, are dissented from, and *Dawson v. Dawson*, 12 Iowa, 512, *Johnson v.*

Barnes, 69 Iowa, 641, Schouler on Domestic Relations, sec. 236, cited in support.

PARENT AND CHILD—DUTY OF PARENT TO SUPPORT CHILD. — A father is under legal obligation to support his minor child: *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48; *Gilley v. Gilley*, 79 Me. 292; 1 Am. St. Rep. 307, and note.

REID, MURDOCK, AND FISHER v. COWDUROY.

[79 IOWA. 189.]

SALES—INSOLVENCY OF PURCHASER—FRAUD. — Where the supposed solvency of the purchaser is a material inducement to a sale of goods, and he makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies in effecting the sale, the latter may rescind it as fraudulent, without proof that the purchaser did not intend to pay for the goods when he bought them.

C. E. Richards, T. J. Hysham, and Smith, Harl, and McCabe, for the appellants.

J. M. Junkin and S. McPherson, for the appellees.

ROBINSON, J. Defendant H. W. Cowduroy was engaged in the grocery business at Red Oak from August, 1887, to the fifteenth day of October, 1888. During that time he purchased goods of plaintiff. On the twenty-first day of August, the twenty-ninth day of September, and the sixth day of October, 1888, the plaintiffs shipped from Chicago to H. W. Cowduroy, at Red Oak, on his order, the property in controversy, consisting of merchandise of the value of \$371.73. The property was received and placed in stock, but the purchase price is unpaid. On the fifteenth day of October, 1888, H. W. Cowduroy executed to his father-in-law, the defendant L. Kirscht, a chattel mortgage on his stock of goods and other property, to secure notes amounting in the aggregate to \$5,350, besides interest. On the same day he executed a mortgage to the Fabyon Knife Company for a consideration of \$237.62, and also a third mortgage, which covered his stock in trade and other property, to his father, the defendant William Cowduroy, to secure the payment of two promissory notes which amounted to \$2,000, besides interest. A mortgage on real estate was also executed in favor of the father at the same time, apparently to secure the same indebtedness. This action was commenced on the seventeenth day of October, 1888, to recover the goods in controversy, on the ground that they were obtained by H. W. Cowduroy through his false and fraudulent representations,

made with intent to defraud the plaintiffs. They claim that when the goods were ordered, shipped, and received by H. W. Cowduroy he was, and for a long time had been, insolvent, and was unable to pay for the goods; that he knew that fact when he ordered and received the goods; that he ordered them with the intent not to pay for them, but to defraud the plaintiffs; that he concealed his insolvency and inability to pay for the goods, and his intent to defraud; that they sold and shipped the goods, relying on his solvency and good faith, and not knowing of his insolvency nor of his fraudulent intent; that before bringing this suit they rescinded their contract of sale in consequence of the facts aforesaid, and are now the owners of the goods. It is conceded by appellees that the mortgages to Kirscht and William Cowduroy were given for antecedent debts, and that the mortgagees were not purchasers for value, without notice, but that they took only the title which the mortgagor had to give, and that if plaintiffs are entitled to recover as against him, they are also entitled to recover as to the mortgagees.

1. The seventh paragraph of the charge to the jury is as follows: "Where the buyer of goods, at the time of or before the purchase, for the purpose of inducing the seller to part with his goods on credit, makes a material representation to the seller as to his financial condition, which representation is in fact false, and known by the buyer to be false when made, and which the seller relies upon in making the sale, and it is also shown that the buyer at the time intended by the representations to defraud the seller by not paying for the goods, such transaction would be fraudulent on the part of the buyer, and the seller could rescind the contract, and recover back the goods." The same rule was substantially given in other portions of the charge, so framed as to meet the facts of the case. Appellants complain of the charge, on the ground that, to recover, they were required to show, not only that the buyer made false and fraudulent representations as to his solvency, upon which plaintiffs relied, but also that he did not intend to pay for the goods when he ordered them. The insolvency of the buyer when the goods were ordered does not seem to be seriously questioned. There can be no doubt that the burden imposed by the charge of the court is as claimed by the appellants, and we are required to determine whether a correct rule of law was announced. As a general rule, fraud in the sale of personal property entitles the party injured thereby to

rescind the contract of sale: Story on Sales, secs. 379, 420, 445 a; 1 Benjamin on Sales, sec. 636. It is contended by appellees that the charge is supported by the opinion in *Houghtaling v. Hills*, 59 Iowa, 287. In that case the petition alleged that the buyer was hopelessly insolvent when he purchased the goods, and unable to pay for them; that he knew that fact; that he knew the sellers did not know it; and that they would not have made the sale had they been aware of it. But it was not alleged that the sellers were misled or deceived by any act or representation of the buyer. The question really involved in the case was, whether the failure of the buyer to disclose his real financial condition was a fraud upon the seller; and the effect of the opinion is to hold that it was not, and that inasmuch as the petition did not show that the goods were purchased with the specific intent not to pay for them, it did not state a cause of action. It did not decide that false and fraudulent representations as to solvency made on the part of the buyer, and relied upon by the seller, would not be sufficient ground to authorize the rescinding of the sale. Mere silence, where the person is under no obligation to speak, is not a legal fraud: 1 Benjamin on Sales, sec. 640; Story on Sales, sec. 174. The cases of *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501, *Nichols v. Pinner*, 18 N. Y. 297, and *Garbutt v. Bank*, 22 Wis. 390, are in point. But where goods are sold there is a promise expressed or implied on the part of the buyer to pay for them; and the seller has a right to rely upon the presumption that the buyer intends to perform his obligations by making payment. Therefore if the latter entertains a secret intent to not make payment, that intent, and his failure to disclose it, constitute such a fraud as will entitle the seller to rescind the sale: *Oswego Starch Factory v. Lendrum*, 57 Iowa, 581; 42 Am. Rep. 53; *Lindauer v. Hay*, 61 Iowa, 665; *Nichols v. Michael*, 23 N. Y. 266; *Hennequin v. Naylor*, 24 N. Y. 140; *Dow v. Sanborn*, 3 Allen, 182; *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 631. See also *Lee v. Simmons*, 65 Wis. 526; *Donaldson v. Farwell*, 93 U. S. 631. The supposed solvency of the purchaser is usually a material inducement to the sale of goods; and where it is, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies, in effecting the sale, it may be rescinded by the vendor as fraudulent. The charge of the court under consideration was erroneous in requiring plaintiffs to prove two material

facts, when proof of one was sufficient to enable them to recover. There was evidence which tended to show that H. W. Cowduroy was insolvent when he ordered the goods; that he must have known that fact, and that he would be unable to pay for them; and also that he made false representations in regard to his assets and liabilities, for the purpose of obtaining credit, which were relied upon by plaintiffs in making the sales; and that they were made to a commercial agency, which was engaged in the business of furnishing to plaintiffs and others information in regard to the financial standing of business men throughout the country. The charge may therefore have been prejudicial.

2. Appellants complain of the refusal of the district court to give an instruction to the jury which was asked by them. There was no error in the refusal. The instruction was based in part upon assumed facts, of which there was no evidence, and omitted an essential element in reciting facts which would constitute fraud sufficient to authorize the rescission of the sale.

3. Other questions are discussed by counsel, but as they are not likely to arise on another trial, need not be determined. For the errors specified, the judgment of the district court is reversed.

RESCISSIION OF SALES FOR FRAUD IN PURCHASE ON CREDIT. — This subject has received attention in notes to *Thurston v. Blanchard*, 33 Am. Dec. 709-711, and *Talcott v. Henderson*, 27 Am. Rep. 504-506. In addition to and in accordance with what is there said, and in view of the later decisions, it may be added, that representations of his solvency made by a buyer as a basis of credit, and known by him to be willfully false, and but for which the sale would not have been made, are fraudulent, and entitle the seller to rescind the sale, and to reclaim the goods so obtained, unless they have passed into the hands of an innocent purchaser: *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48; *Deitz v. Sutcliffe*, 80 Ky. 650; *Kline v. Baker*, 106 Mass. 61; *Kyle v. Ward*, 81 Ala. 120; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Robinson v. Levi*, 81 Ala. 134; *Wollner v. Lehman*, 85 Ala. 274; *Newell v. Randall*, 32 Minn. 171; 50 Am. Rep. 562; *Spira v. Hornthall*, 77 Ala. 137; *Morrison v. Adoue*, 76 Tex. 255. The rule is thus laid down in *Spira v. Hornthall*, 77 Ala. 143: "Though of comparatively modern origin, the doctrine is now firmly in the jurisprudence of both England and this country that a vendor, induced by misrepresentation or fraudulent concealment to sell goods to a purchaser who is insolvent and has no intention to pay for them, may disaffirm the sale, and reclaim the goods as against the fraudulent vendee, or any person claiming under him with notice." Where personal property is sold on the false and fraudulent representation of the purchaser that he owns certain real and personal property unencumbered, and that there are no judgment or other liens against him, and he thus obtains possession of the property and credit for the price, giving no security except a mortgage upon the property itself, when in fact there are judgment

liens against him, and he is insolvent, the vendor, on discovering the fraud, may rescind the contract and reclaim the property: *Hughes v. Winship etc. Co.*, 78 Ga. 793. So an action to rescind the sale may be maintained for false representations on the part of the purchaser as to his ability to pay for the goods purchased: *Cain v. Dickenson*, 60 N. H. 371.

Although it appears to be pretty generally maintained that while a representation of solvency on the part of the buyer is ordinarily implied in every application to purchase goods on credit, it requires a willfully false statement to that effect as a fact, and not as a mere opinion to vitiate the contract, or else it must appear that at the time of the purchase the buyer contemplated a swindle, and did not intend or expect to pay for the goods: *Yeager Milling Co. v. Lawyer*, 39 La. Ann. 572; *Jaffray v. Moss*, 41 La. Ann. 549. Thus an action will not lie against one for obtaining credit by falsely representing that he is a person safely to be trusted and given credit: *Lyon v. Briggs*, 14 R. I. 222; 51 Am. Rep. 372. Still it is decided in *Mooney v. Davis*, 75 Mich. 188, 13 Am. St. Rep. 425, that the misrepresentation or concealment by a merchant as to his financial condition need not be willful nor intended, in order to constitute a fraud which will vitiate a sale made to him, if such representations are relied upon. It is sufficient if they have the effect to defraud. Where goods have been obtained on credit by means of representations known to be false, it is no defense that the purchaser expected to be able to pay for them, and had no intention of subjecting the seller to a loss: *Judd v. Weber*, 55 Conn. 267; and a false statement made by a buyer who has full opportunity to know whether it is true or not in reference to a material fact, although it may not be known to him to be false, also furnishes ground for the avoidance of the sale, if it is made when he has no reason to believe it to be true. A partner making such statement cannot be heard to deny his knowledge of the condition of the firm business; for it is his duty to know, and to make no statement not substantially correct when he knows that the seller may be influenced by it: *Morrison v. Adoue*, 76 Tex. 256. So a sale of chattels to a corporation may be rescinded where credit was given on the strength of contemporaneous representations of the officers as to its solvency, which representations are shown to have been false and fraudulent when made: *Candy v. Globe Rubber Co.*, 37 N. J. Eq. 175. Where an agent purchases goods for his principal under false representations as to his indebtedness, the vendor cannot rescind the sale, if at the time the principal is solvent and able to pay and has no intent not to pay, as there is no fraud in the purchase: *Mack v. Adler*, 48 Ark. 70.

A person furnishing false information to a mercantile agency, to be communicated to persons who may be interested in obtaining it for guidance in giving credit to such person, is as much liable to the person thereby defrauded as if he made the false representations directly to the party injured: *Eaton v. Avery*, 83 N. Y. 31; *Robinson v. Levi*, 81 Ala. 135; *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48; *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425. Although the mere concealment of his insolvency by a purchaser on credit will not generally make the sale fraudulent, still if this is coupled with an intent not to pay, or its equivalent, namely, no reasonable expectation of being able to pay, the sale is fraudulent, except as to *bona fide* purchasers. The rule is stated to be, that where a person who is insolvent purchases goods on credit, and not intending to pay, conceals his insolvency and intention not to pay, he is guilty of fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods: *Johnson v. O'Donnell*, 75 Ga. 453; *Taylor v. Mississippi Mills*,

48 Ark. 247; *Fechheimer v. Baum*, 37 Fed. Rep. 167; *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Des Farges v. Pugh*, 93 N. C. 31; 53 Am. Rep. 446; *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630; *Brower v. Goodyer*, 88 Ind. 572; *Onwego Starch Co. v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53; *Thomas v. Freiligh*, 9 Mo. App. 151; *Burrill v. Stevens*, 73 Me. 395; 40 Am. Rep. 366. In cases of fraudulent representations as to solvency, fraudulent concealment of insolvency, and intention never to pay by the buyer at the time of purchasing goods on credit, his attaching creditor or subpurchaser with notice is not entitled to protection as against the defrauded vendor: *Wollner v. Lehman*, 85 Ala. 274; *Taylor v. Mississippi Mills*, 47 Ark. 247. So where the intent on the part of the original vendee not to pay for the goods is established, a purchaser from him cannot hold them as against the original vendor, when the consideration of the sale to him was an antecedent debt which he held against the fraudulent vendee: *Sleeper v. Davis*, 64 N. H. 59; 10 Am. St. Rep. 377. And the same rule applies to the assignee of the fraudulent vendee: *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630. If a merchant orders goods, knowing himself to be insolvent, without disclosing it, and with the preconceived purpose of having them swell his assets for the benefit of those whom he intends to make his preferred creditors, and with the preconceived design also of not paying for them at all, or at most, only a very small per cent, the purchase is fraudulent, and the vendor, upon discovering the fraud, may rescind the contract and retake the goods as against the vendee or his assignee for the benefit of creditors: *Lee v. Simmons*, 65 Wis. 523.

In some of the states a purchase of goods on credit by one who, at the time, intends not to pay for them, is such a fraud as will entitle the vendor to avoid the sale, although there were no fraudulent misrepresentations or false pretenses, and proof of an intent on the part of the vendee not to pay for the goods is sufficient to avoid the sale, without proof of anything else: *Farnell v. Hanchett*, 120 Ill. 573; *Ross v. Miner*, 67 Mich. 410. A different rule, however, prevails in Alabama, where, if an insolvent purchaser obtains goods by misrepresentation or by fraudulent concealment, having at the time no intention to pay for them, the seller may disaffirm the sale and reclaim the goods as against the fraudulent purchaser, his attaching creditor, or any subpurchaser from him, with notice of the fraud: *Spira v. Hornthall*, 77 Ala. 137.

The burden of proof is upon a vendor seeking to rescind a sale for fraud to establish three facts: 1. That the purchaser was, at the time of the sale, insolvent, or in failing circumstances; 2. That he had, at the time, a preconceived intention not to pay for the goods, or, what is deemed its equivalent, no reasonable expectation of being able to do so; and 3. That he must have intentionally concealed these facts, or have made fraudulent representations in reference to them: *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Kyle v. Ward*, 81 Ala. 120; *Robinson v. Levi*, 81 Ala. 134; *Wollner v. Lehman*, 85 Ala. 274. So in *Manheimer v. Harrington*, 20 Mo. App. 297, it is maintained that the seller of goods on credit cannot rescind the contract of sale, and maintain replevin for the goods, upon proof that the purchaser had, at the time that the purchase was made, no reasonable expectation of being able to pay for them; such vendor must also prove that at the time of the purchase the buyer never intended to pay for the goods. To the same effect is *Houghtaling v. Hills*, 59 Iowa, 287; and *Dalton v. Thurston*, 15 R. I. 418; 2 Am. St. Rep. 905. So in *Reitcker v. Katzenstein*, 26 Ill. App. 33, it is decided that where the purchaser of goods on credit is at the time insolvent, and knows it, concealing the fact from the seller, and

having no reasonable expectation of being able to pay, this will not entitle the seller to rescind and recover the goods, in the absence of proof of an actual intent on the part of the purchaser not to pay for them. The ruling in *Kelsey v. Harrison*, 29 Kan. 143, is in accord with this statement, where the court said: "Concerning the claim that the debt sued upon was fraudulently contracted, it is contended that at the time defendant contracted the debt with plaintiffs he was insolvent, and that as he concealed such fact from the sellers, it was, considering the other facts in proof, such a measure of bad faith as constituted a fraudulent contracting of the debt within the meaning of the attachment law. The facts do not in any way show that the debt was fraudulently contracted. There is nothing in the evidence that he made his purchases at other than the usual times, and in the regular course of his business. No false or other improper representations were made by him at the time of his purchases, to the plaintiffs or other parties, in regard to his condition, tending to mislead or induce them to give him credit, which they otherwise would have withheld. It is true that some of the evidence tends to show that for some time he had been running behind; to use his own words, 'going down for several years'; that his trade was falling off, and his business drifting rapidly in a bad condition; but there is no evidence showing intentional concealment at the time of his purchases, or any intention at such time to cheat his creditors; nor can we say there was at any time any actual intention on his part to do any act the necessary result of which was to cheat and defraud plaintiffs or others. Now, to sustain the claim of plaintiffs upon the ground of fraud, they must establish that defendant made the purchases with the preconceived design not to pay, or, what is the same, that he intended to commit a fraud at the time he made his purchases of the plaintiffs, which were not paid for at the commencement of this action, and that he proceeded deliberately to consummate such fraud. This is not shown." So in *Rodman v. Thalheimer*, 75 Pa. St. 232-237, it is said that "the law in this state is not that insolvency and the mere knowledge of it are such a fraud as to set aside the sale and enable the seller to rescind, and to replevy the goods after they have come fully and fairly into the possession of the purchaser. It requires artifice, trick, or false pretense, as a means of obtaining possession, to avoid the purchase. There must be bad faith, an intent at the time to defraud the seller. Insolvency, and a knowledge of it at the time of the sale, are evidence to go to the jury, with other facts, to show the intended fraud, but, standing alone, will not operate to rescind after a possession fully and fairly acquired."

The fraudulent purpose and intent of the vendee not to pay for the goods purchased on credit can rarely be proved by direct evidence, such as declarations to that effect. It is usually established by circumstances from which a jury may infer the intent: *Ross v. Miner*, 67 Mich. 410; *Taylor v. Mississippi Mills*, 47 Ark. 247; *Brower v. Goodyer*, 88 Ind. 272. In order to avoid such sale as fraudulent, the fraud must have existed when the property was sold, but it may be established by proof of subsequent acts throwing light on the transaction, and what was done before the sale assailed as fraudulent: *Ross v. Miner*, 64 Mich. 204.

ST. LOUIS REFRIGERATOR AND WOODEN GUTTER
Co. v. VINTON WASHING MACHINE Co.

[79 IOWA, 239.]

PRINCIPAL AND AGENT — SALE — REPRESENTATION BY AGENT AS EVIDENCE — ESTOPPEL. — Oral representations of an agent, in making a sale of lumber that his principal will furnish Star Poplar "bone dry," are admissible in an action for the price, and are binding on the principal as part of the contract, although such contract, as evidenced by the correspondence between the principal and purchaser, only calls for Star Poplar, which might be either wet or dry. The purchaser is not estopped from denying that his letter ordering Star Poplar, omitting to say that it must be dry, expressed the whole contract, the agent having represented that that grade of lumber was always dry.

Gilchrist and Whipple, for the appellant.

G. W. Burnham, for the appellee.

ROBINSON, J. The plaintiff sold and delivered to defendant six car-loads of lumber, and seeks to recover a balance alleged to be due thereon of \$259.72. Defendant admits having received the lumber, but alleges that a part of it was not of the kind and quality agreed upon and ordered, and claims damage for the alleged breach of contract. The verdict and judgment, in favor of defendant, were for eighteen dollars, besides costs.

1. Appellee claims that a part of the agreement for the purchase of the lumber in controversy was verbal, and that it was made with an agent of plaintiff named Cordry. Appellant contends that the agreement was wholly in writing, in the form of correspondence between the parties, carried on after the alleged agreement with Cordry was made, and that the court erred in permitting appellee to prove the Cordry agreement. That was made in October, 1885. At that time defendant was engaged at Vinton, in the business of manufacturing washing-machines, and required dry poplar lumber of a particular description for that purpose. Cordry represented to it, in substance and effect, that the kind of lumber it desired was known as Star Poplar; that one half of it was sixteen inches or more in width, and sufficiently good to furnish sides for the washing-machines; that the remainder of it was common, narrow lumber; that all of it should be "bone dry" when it was received by defendant; that it would be far superior to a pile at the factory door, to which his attention was called, and that plaintiff did not manufacture so poor a grade as that. He was informed

that defendant could not use any lumber which was not dry. It is shown that at that time there was a grade of lumber known in trade at St. Louis and in the South as Star Poplar, and the evidence tends to show that the lumber shipped by plaintiff to defendant to fill the agreement in controversy was of that kind, but defendant had no knowledge of what was required to constitute that grade, excepting that derived from Cordry.

On the twenty-second day of October, 1885, defendant wrote to plaintiff as follows: "Your agent called on us yesterday to further furnish us with lumber designated as Star Poplar, and proposed to sell us ten car-loads at \$18.50 per thousand, two per cent off, delivered at St. Louis, and to be ordered by us in single car-load lots at such time as we may order, the entire shipment to be made in six months from date. Half of said lumber to be sixteen inches wide and upwards, and balance from seven to twelve inches and upwards; to be dressed on both sides, seven eighths inch in thickness. This proposition was left by your agent for us to consider, which we hereby accept, expecting the shipment from West St. Louis." The plaintiff at first refused to recognize the agreement, on the ground that the price should be twenty dollars per thousand; but November 2, 1885, it wrote to defendant as follows: "Our Mr. Cordry says that he said he would submit the offer at the price you mention, but did not take any order, or state the order would be accepted at that price. But your letter seems to be very positive, and we know our Mr. Cordry to be careless, and we will ship you a car this week." The evidence tends to show that the first two car-loads received by defendant were reasonably satisfactory; that the next four car-loads were not so good as the lumber of Star Poplar grade was represented to be by Cordry, in that the proportion of wide lumber was less, and it was so wet as not to be in condition for use. The agreement for the remaining four car-loads was then canceled. Appellant contends that whatever agreement the parties had prior to the letter of October 22, 1885, and the acceptance of its terms, it was in law merged in the written contract as expressed in the correspondence, and that the court erred in permitting the representations of Cordry to be treated as a part of the contract. It may be that in recognizing the contract and shipping the lumber the plaintiff had no actual knowledge of what Cordry had said, excepting of that part disclosed by defendant's let-

ter. But Cordry's authority to bind the plaintiff cannot be questioned. The evidence shows that lumber of the grade in question may be either green or dry; that lumber is sometimes graded when green, and becomes Star Poplar when graded; that plaintiff had lumber of that grade in its yards when the agreement was made, which was from two to twelve months old, of which some was green or wet, and some was dry. Plaintiff was chargeable with Cordry's knowledge of his representations, and his knowledge of the use for which the lumber was ordered by defendant. It appears that although Star Poplar grade included both wet and dry lumber, it was not necessarily mixed. The letter of defendant ordered Star Poplar lumber, and we think it did not contradict the terms of the writing to show what Cordry had represented and agreed in regard to the kind of lumber in the grade ordered which should be sent. But for his participation in the making of the contract, plaintiff could have discharged its obligation by sending either wet or dry lumber of the grade named. But the contract was substantially made by Cordry, and ratified by plaintiff. It is therefore bound by all the provisions of the agreement, whether actually known to it or not: *Farrar v. Peterson*, 52 Iowa, 420; *Eadie v. Ashbaugh*, 44 Iowa, 520. The quality of lumber required by defendant was fully understood by Cordry. It was known to him, and constructively by plaintiff, that defendant could not use wet lumber. It is clear that defendant did not intend to contract for that kind of lumber, and plaintiff knew it. Therefore to construe the agreement as appellant contends it should be construed, would enable plaintiff to perpetrate a fraud upon defendant. The language of the correspondence is not such as to require that construction; hence it should be so construed as to carry into effect the real agreement and intent of the parties: See *Thompson v. Locke*, 65 Iowa, 432; *Pilmer v. Branch Bank*, 16 Iowa, 322; *Merriam v. United States*, 107 U. S. 437; *Dayton v. Hooglund*, 39 Ohio St. 680.

2. It is claimed that defendant is estopped from asserting that the letter of October 22, 1885, did not fully exhibit the terms of the agreement with Cordry, for that plaintiff believed it to contain a full statement of the terms proposed by its agent, and acted upon that supposition in ratifying the agreement and shipping the lumber. But that theory ignores the fact, as claimed by defendant, and proven, that Cordry was fully authorized to contract for plaintiff, and that he sub-

mitted a proposition to be presented to the board of directors of defendant, which was acted upon and accepted by that board, and that the letter in question was a notification to plaintiff that its offer had been accepted. Defendant had no reason to state in that letter that the lumber must be dry, for the reason that Cordry had represented that it would be dry, over a year old, and knew that defendant could not use it while green, while it does not appear that defendant then knew that the grade named ever included green lumber. The first two car-loads corresponded with the representations of Cordry. Before the first car was shipped under the agreement in controversy, defendant wrote to plaintiff that it expected the car it was to ship that week would "prove, as Mr. Cordry stated, a higher grade" than they had theretofore had; thereby informing plaintiff that representations as to the quality of the lumber, other than the naming of its grade, had been made by Cordry. When the third car-load was received by defendant, it at once notified plaintiff that it was not satisfactory, and that it was to have dry, seasoned lumber, and hoped it would be able to ship perfectly dry lumber at once. Defendant complained of each of the car-loads subsequently sent, reiterating its claim that the lumber was to be "bone dry," and when the sixth one came to hand, refused to take any more of the kind sent. Under these circumstances, we are of the opinion that an estoppel was not shown. The letter of October 22, 1885, embodies the agreement of the parties, excepting the definition of the terms used therein to designate the lumber sold, and plaintiff was chargeable with knowledge of the kind which defendant had a right to demand.

3. Objections are made to portions of the charge to the jury. It might have been made more explicit in some respects, and in one or two matters of minor importance it may not have been quite accurate, but, taken as a whole, we think it instructed the jury as to their duties quite fully and fairly, and that plaintiff could not have been prejudiced by anything of which it complains.

4. It is claimed that the verdict was excessive. There was evidence to sustain a verdict for about the amount found by the jury. If it is too large, the excess is merely nominal, and we should not be justified in disturbing the judgment on that ground.

Affirmed.

AGENCY — AGENT'S REPRESENTATIONS. — Representations made by an agent at the time he is contracting for his principal constitute a part of the contract, and are admissible against the principal as part of the res gestæ: *Hazen v. Brown*, 7 Greenl. 421; 22 Am. Dec. 206; *Sidney School F. Co. v. Warsaw School District*, 122 Pa. St. 494; 9 Am. St. Rep. 124.

PAROL TESTIMONY TO EXPLAIN WRITINGS. — The rule excluding parol evidence to affect written contracts does not reject an antecedent parol agreement imposing a different but not inconsistent obligation: *Blossom v. Griffin*, 13 N. Y. 569; 67 Am. Dec. 75. Parol testimony consistent with a writing to which it relates is admissible: *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 751. All the surrounding facts of a transaction should be admitted in evidence, if they can be established by competent means, and afford any fair presumption of the question in dispute: *Pennsylvania etc. Nav. Co. v. Dandridge*, 8 Gill & J. 248; 29 Am. Dec. 543. Parol testimony is admissible to explain the subject-matter of a written contract, when not inconsistent with its terms: *Note to Appeal of Cornwall etc. R. R. Co.*, 11 Am. St. Rep. 394; *note to Sullivan v. Lear*, 11 Am. St. Rep. 395.

STEELE AND SON v. SIOUX VALLEY BANK.

[79 IOWA, 239.]

DEEDS — QUITCLAIM. — An unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though based upon a valuable consideration, and taken without actual notice of the bond.

DEEDS — QUITCLAIM. — The holder of a quitclaim deed takes it charged with notice of prior equities, and is not an innocent holder.

DOWER — RELEASE OF. — A married woman who has joined in the execution of a bond for a deed given to secure her husband's debt is estopped from claiming dower upon a foreclosure of the bond, on the ground that she had no information that it was intended as a security instead of an actual sale.

FORECLOSURE of a bond for a deed. One Lauber, being the owner of a parcel of land, and indebted to plaintiffs, gave them a bond for a deed to the land to secure the debt. This bond was given June 8, 1887, but not recorded until June 25, 1887. Lauber being also indebted to defendant, gave it a quitclaim deed to the same premises June 14, 1887. Judgment for plaintiffs, and defendant appeals.

Hubbard, Spalding, and Taylor, for the appellant.

E. C. Herrick, and Marsh and Henderson, for the appellees.

GRANGER, J. 1. It will be observed that the question is fairly presented as to the effect of a quitclaim deed given for a consideration, without actual notice of and after the execution and delivery of an unrecorded bond for a deed for value. Counsel for appellant commence their argument with this

statement: "The case here is one exactly parallel to the case of *Pettingill v. Devin*, 35 Iowa, 353"; and we think the statement true. Appellees do not, as we understand, controvert it, but urge that the *Pettingill* case has been repeatedly overruled, and is no longer the law of the state. The arguments in the case are mainly devoted to the question of how the case of *Pettingill v. Devin*, 35 Iowa, 353, is affected by subsequent rulings. It may be said that the case is nowhere in terms overruled. As to the necessary or legal effect of other decisions upon it, we must inquire.

A reference to the *Pettingill* case will show how nearly the facts of the two cases are alike as to the particular question involved. Coffin held an unrecorded bond, of which the defendant Devin had no actual notice. Devin afterwards obtained a quitclaim deed, for which he paid a consideration. It was held that the quitclaim deed took precedence of the unrecorded bond. The holding was based largely on section 2220 of the revision of 1860, as follows: "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of deeds of the county in which the land lies, as hereinafter provided." Section 1941 of the code is identical in its language. This court has repeatedly held that the holder of a quitclaim deed takes it charged with knowledge of prior equities; that he is not an innocent holder.

To a proper disposition of the question before us, it is important that we consider, to some extent, at least, the particular facts under which these holdings were announced; and we think it may be done in a general way, without referring to each particular case. Appellant, recognizing the fact that, including the *Pettingill* case, two rules have been announced as to the effect of a quitclaim deed, makes this statement: "The cases decided by this court in which the broad doctrine is announced that a purchaser taking a quitclaim takes subject to equities are all of them based upon one of two thoughts: either all the right, title, and interest of the person executing the quitclaim have been previously conveyed, so that he has no right, title, and interest to convey, or some equity not at all dependent upon a written instrument or the record thereof has arisen against the land." We do not see how the fact that the grantor in the quitclaim deed had, before its execution, disposed of all his interest in the land could make or justify a different rule; and we find no intimation in any of the cases

that that fact is made the basis for a distinction. Under such a rule, if A, being the owner of land, should dispose of it to B, and, without actual or constructive notice, should quitclaim to C, the latter would, by operation of law, be charged with notice of B's interest. Now, if instead of conveying the entire estate to B, A should convey an undivided one half, and a quitclaim should be made to C, with the facts as before stated as to notice, C could take the land discharged of B's equities. Before such a distinction is maintained, it should have the support of authority or strong reason, and we discover neither. The latter part of appellant's statement, that the cases are based on "some equity not at all dependent upon a written instrument or the record thereof," has support in some of the cases; and we think if the distinction is to be maintained, it it must be on that theory.

In the case of *Springer v. Bartle*, 46 Iowa, 690, the court, having under consideration the protection afforded by a quitclaim deed as against the fraudulent title of the grantor, used this language: "Ide quitclaimed to the defendant all his right, title, and interest in and to the land in controversy. It was held in *Watson v. Phelps*, 40 Iowa, 482, heretofore cited, that 'one holding under such a deed is not to be regarded as a *bona fide* purchaser without notice of equities held by others.' In an argument evidencing much ability, we are asked to overrule this decision; and counsel in their zeal claim that this court has held otherwise in *Pettingill v. Devin*, 35 Iowa, 353. This is a grave mistake. No such point was presented in that case. The point decided was, that, under the recording act, a person holding under a quitclaim deed acquired a prior right to one claiming under a bond for a deed of which he did not have notice. In that case the party executing the quitclaim deed owned the legal title; but in the case at bar, Ide's title was tainted with fraud, against which the quitclaim deed did not protect the plaintiff. Besides which, the statute expressly provides that such a purchaser as Devin is protected against a prior unrecorded conveyance: Code, sec. 1941. The doctrine announced in *Watson v. Phelps*, 40 Iowa, 482, was approved in *Smith v. Dunton*, 42 Iowa, 48; *Light v. West*, 42 Iowa, 138; and *Besore v. Dosh*, 43 Iowa, 211. These decisions meet our approbation, and we are unwilling to take, at this late day, the time and space requisite to vindicate their correctness." In that case it will be seen that the equity as to which the quitclaim deed was held subject was not one that would have

been manifest if all instruments of conveyance had been recorded. The cases of *Watson v. Phelps*, 40 Iowa, 482, *Smith v. Dunton*, 42 Iowa, 48, and *Besore v. Dosh*, 43 Iowa, 211, are all ruled on facts of like legal import. The record of conveyances would not have given notice of the equities involved. The following cases sustain the same legal proposition: *Winkler v. Miller*, 54 Iowa, 476; *Ballou v. Lucas*, 59 Iowa, 24; *Kaiser v. Waggoner*, 59 Iowa, 41; *Laraway v. Larue*, 63 Iowa, 412; *Butler v. Barkley*, 67 Iowa, 491; *Bradley v. Cole*, 67 Iowa, 653.

There are, however, some cases where the facts are different, and where the equities urged as against a quitclaim deed would have been apparent from the recording of the instruments under which claim were made, but where they were not recorded. In the case of *Wightman v. Spofford*, 56 Iowa, 145, it must be taken for granted that the contracts and instruments there referred to were not recorded, as if they were of record, the questions discussed could not have well arisen. The only equities in the case, as it was ruled, arose out of contracts and deeds of conveyance which might have been of record. There Casaday, who owned the land, and had given a contract of sale under which plaintiff indirectly claimed the title, afterwards gave to Robertson a quitclaim deed, by virtue of which Robertson claimed the title. The court, in disposing of Robertson's interest, used these words: "As he bases his title upon a quitclaim deed, he cannot be regarded as a purchaser without notice of plaintiff's equities." The facts of the case, so far as pertains to their legal significance, are not different from those of *Pettingill v. Devin*, 35 Iowa, 353. In *Raymond v. Morrison*, 59 Iowa, 871, Wellington had conveyed the land by deed to Downey, whose deed was not recorded. Wellington afterwards quitclaimed to Varnum, and on the trial it was sought to be established that Varnum had knowledge to put him on inquiry as to the deed to Downey; but this court practically dismissed the inquiry as immaterial, holding that, as he held under a quitclaim deed, he could not be regarded as a good-faith purchaser. The same rule is expressed in the case of *Fogg v. Holcomb*, 64 Iowa, 621, where the controversy is based on muniments of title. It is said that one who holds by a quitclaim deed cannot be regarded as an innocent purchaser of the land for value. A very pointed case, upon a similar state of facts, is that of *Postel v. Palmer*, 71 Iowa, 157. Norton owned the land, and executed a conveyance to Brown in October, 1873, which conveyance was not

recorded. On the thirty-first day of March, 1884, he conveyed the land to the plaintiff by quitclaim deed. There is no pretense of actual notice. The opinion says: "That conveyance, as we have stated, was a mere quitclaim; and by it plaintiff could acquire no right against outstanding equities which were valid as against Norton."

It thus appears that in four different cases, from 1881 to 1887, this court has held to a rule at variance with that of *Pettingill v. Devin*, 35 Iowa, 353, and under facts which render the holdings inconsistent; and in effect they must overrule the former case, if they are to stand as the law of the state. Is there any reason why the former should remain the rule in preference to the latter? As has been said, the former case depends largely for its support on the recording act of the state. Of course, the statute, in the true spirit, should prevail; and if that spirit is reflected in the *Pettingill* case, the holding therein announced should be sustained, even to the overruling of the other cases. As to any support the *Pettingill* case may have independent of the statute, we must look to other states, as the decisions of this court in all the other cases cited in this opinion are against it. It may be conceded that the courts of other states are not in harmony as to the effect of a quitclaim deed. Its effect generally has been discussed in this state, and the holding of the court is by no means doubtful.

In discussing generally the effect of a quitclaim deed, Mr. Chief Justice Adams used these words in *Winkler v. Miller*, 54 Iowa, 476: "Woodward, who derived title by quitclaim deed, could not be deemed a *bona fide* purchaser without notice. . . . Where a person purchases of another, who is willing to give only a quitclaim deed, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title, even as against himself; and it may be presumed that the purchase price was fixed accordingly."

In the case of *Woodward v. Jewell*, 25 Fed. Rep. 691, speaking of the effect of a quitclaim deed, the court says: "This question has been adjudicated by the courts of the several states so as to leave a distressing conflict of authorities; but the supreme court of the United States has settled the rule for our guidance here. They hold that a grantee in a quitclaim deed cannot defend as a *bona fide* purchaser without notice."

A few brief extracts will indicate the views and holding of the supreme court of the United States as to the effect of a quitclaim deed. In *Oliver v. Piatt*, 3 How. 410, the court said: "Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him were accordingly drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser for a valuable consideration without notice against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts." Also, in *May v. Le Claire*, 11 Wall. 217, it is said: "On the 27th of July, 1859, Dessaint conveyed, by a deed of quitclaim, to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases, the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

In *Gest v. Packwood*, 34 Fed. Rep. 372, it is said, speaking of a quitclaim deed: "Notice sufficient to prevent the purchaser from being *bona fide* is said to inhere in the very form of this kind of a conveyance. . . . In such a case, the purchaser only takes whatever the grantor could lawfully convey, — what there is left in him." The holding is supported by a reference to *Oliver v. Piatt*, 3 How. 410. It would be fruitless to cite largely from state decisions on this question. The rulings of the majority of the state courts are in harmony with those of the federal courts on this question. In *Johnson v. Williams*, 37 Kan. 179, 1 Am. St. Rep. 243, it is said: "In nearly all cases between individuals, where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the

title; and the deed itself is notice to him that he is getting only a doubtful title."

Barring the case of *Pettingill v. Devin*, 35 Iowa, 353, the authorities in this state are in accord with those of the federal courts; and, to our minds, the reasoning of the cases cited, independent of statutory considerations, is unanswerable. Let us look to the statute to see if it is controlling in importance. Code, section 1970, gives a form for quitclaim deeds as follows: "The following, or other equivalent forms, varied to suit circumstances, are sufficient, for the purposes therein contemplated, for a quitclaim deed: 'For the consideration of — dollars, I hereby quitclaim to A B all my interest in the following,' " etc. It is apparent that no more is contemplated by such a conveyance than to convey the interest of the grantor, whatever it may be. It should be noticed that in this form of deed the grantor does not covenant or say that he has the title, or any interest. In this respect it is in marked contrast with the ordinary deed of conveyance, which expresses exactly what the title-owner can and should express, and what the purchaser desires. It in no sense purports to convey a title, not even by inference. If it was there by legal inference, then the grantor would be liable for its failure; and such is not the effect of a quitclaim deed. It is practically said in *Gest v. Packwood*, 34 Fed. Rep. 372, that the deed is itself a notice of a want of or a defect in the title. These deeds are generally taken upon a venture. The idea is: "I may get something, or I may not." This court, in the cases cited, has many times said that the holder of the quitclaim deed takes it with notice of prior equities. Looking to code, section 1941, its language makes it inapplicable to such a state of facts. Its language is, that "no instrument affecting real estate is of any validity against subsequent purchasers . . . without notice," etc. If the presentation of such a deed is notice of a defect in or want of title, then the holder cannot take without notice, and stands unprotected by the statute. We think the case of *Pettingill v. Devin*, 35 Iowa, 353, must be regarded as overruled by subsequent decisions.

2. A question is made in the case as to the dower interest of Mrs. Lauber, it appearing that when she signed the bond to plaintiffs she had no information that it was intended as security, instead of an actual sale. We do not see how, under the state of this record, this fact would change the result. The actual consideration — four thousand seven hundred dol-

lars — was paid; and if the property is taken for that consideration, even by the process of foreclosure, how can she complain? She has merely parted with what she intended to, for the consideration intended. No prejudice has resulted to her from a variance as to facts, nor does she complain. Neither can the variance as to facts prejudice the defendant.

3. It is urged that the defendant was in fact a good-faith purchaser, or parted with its money in good faith, relying upon the record as to the condition of the title. Of this we have no doubt; but, with our holding as to the legal *status* of the holder of such a deed, the legal presumption must prevail as against the facts as claimed. We think the judgment of the district court right, and it is affirmed.

QUITCLAIM DEED — RIGHTS OF GRANTER. — One holding or claiming under or through a quitclaim deed cannot claim protection as a *bona fide* purchaser: *Garrett v. Christopher*, 74 Tex. 453; 15 Am. St. Rep. 850, and note; *Goddard v. Donaha*, 42 Kan. 764; *American Mortgage Co. v. Hutchinson*, 19 Or. 334; *Wolf v. Zabel*, 44 Minn. 91.

MARRIED WOMEN — ESTOPPEL. — For the law relating to the doctrine of estoppel as applied to married women, see *Brown v. Thompson*, 31 S. C. 436; 17 Am. St. Rep. 40, and note.

BECKER v. KEOKUK WATER-WORKS.

[79 IOWA, 419.]

MUNICIPAL CORPORATIONS — WATER COMPANY, WHETHER ANSWERABLE FOR LOSS OF PROPERTY BY FIRE FROM ITS FAILURE TO PERFORM ITS CONTRACT. — Where a city contracts with a water company for a supply of water to extinguish fires, such supply to be paid for by the levy of a special tax, there is no privity of contract between the tax-payer and such company authorizing him to maintain an action against it for the destruction of his property by fire, caused by its failure to fulfill its contract.

CONTRACT — PRIVILEY. — LEVY AND COLLECTION of a tax by a city, in discharge of a contract legally made by it, does not create any privity of interest between the contractor and the tax-payer.

MUNICIPAL CORPORATION — CONTRACT BY CITY TO INDEMNIFY PROPERTY-HOLDER. — A law which authorizes cities to contract with individuals and companies for the building and operating of water-works does not, in the absence of express provision to that effect, confer power upon the city to contract with such individual or corporation to indemnify a tax-payer, so as to enable him to maintain an action in his own name for a breach of the contract.

James H. Anderson, for the appellant.

James C. Davis, for the appellee.

ROBINSON, J. In the year 1877, the city of Keokuk, by means of an ordinance, entered into an agreement with defendant for a supply of water. The ordinance specified the capacity of the water-works which should be operated by defendant, and provided that it should at all times, day and night, be prepared to perform certain duties imposed by the ordinance, and to furnish the quantity of water specified. It provided that the city should pay fixed amounts for the use of a specified number of hydrants to be furnished by defendant for the purpose of extinguishing fires, and for other use, and that the amounts to be so paid should be raised by means of a special tax, to be levied upon the taxable property within the limits of the city which would receive benefit and protection from the water-works. Section 18 of the ordinance is as follows: "That in laying down the pipes and conduits necessary to supply the city with water, it is hereby expressly provided that no authority is conferred by the council to interfere with the rights and privileges heretofore granted to the Keokuk Gas-light and Coke Company, and to railroads and other public corporations holding under the city; and it is expressly provided that said water-works, in laying its mains and pipes, and in enjoying the privileges herein granted, shall not in any manner disturb or displace any of the permanent monuments of the said city at street crossings, and in other places. This grant to the water-works company being conferred with the expressed conditions that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement, or fault of itself or its employees while engaged in the construction or operation of said works; and should the city be sued therefor, they shall be notified of such suit, and thereupon it shall be the duty of said company to defend or settle the same, and should judgment go against the city, in such case they shall recover the amount, with costs, from the company, and the record of the judgment against the city shall be conclusive evidence in the cause to enable the city to recover in any suit therein against the company."

The plaintiff was a property owner and tax-payer of the city of Keokuk at the time of the fire in controversy, and had paid special taxes levied upon his property pursuant to the terms of the ordinance, which were used, as therein provided, for the payment of defendant. While the contract with defendant was in force, property belonging to plaintiff situate within the limits of the city to be benefited and pro-

tected by the water-works was destroyed by fire. The fire department of the city was at the fire in time to have extinguished it, but the supply of water failed through the fault of defendant, and in violation of its agreement, in consequence of which the property of plaintiff was burned. He seeks to recover its value of defendant.

1. The demurrer contains several grounds, only one of which, however, is so fully set out as to require examination. That is, in substance, that the petition fails to show a privity of contract between plaintiff and defendant. The chief question raised by the demurrer was considered in *Davis v. Clinton Water-works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires, and to that fund plaintiff contributed. It is said that in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the tax-payers. In making the contract, the city discharged one of the duties for which it was created; and in raising the required money it only provided the consideration due from it by virtue of the contract. It will hardly be claimed that defendant could proceed against a tax-payer, in the first instance, for any unpaid money due under the contract from the city.

2. It is said that section 18 of the ordinance expressly provides that defendant shall be liable for all injury to persons or property caused by the negligence or mismanagement of defendants or its employees, and that this action is authorized by section 2552 of the code. It was decided in *Vanhorn v. City of Des Moines*, 63 Iowa, 448, 50 Am. Rep. 750, that the city was not liable for the failure of the water-works company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise for malfeasance or neglect on the part of the company. It was further held that the city could not assume a liability for negligence where none was imposed by law, and that the contract of indemnity must be regarded as having reference to existing grounds of liability, and not as creating new ones. Much

stress is placed by appellant upon that part of section 18 which provides "that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement, or fault of itself or its employees while engaged in the construction or operation of said works." Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed: *Clark v. City of Des Moines*, 19 Iowa, 212; 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa, 57; 22 Am. Dec. 215. The law which authorizes cities to contract with individuals and companies for the building and operating of water-works confers no powers upon a city to make a contract of indemnity for the individual benefit of a tax-payer, for a breach of which he could maintain an action in his own name. In view of the law applicable to such cases, the provision of section 18, relied upon by appellant, considered in connection with the entire ordinance, must be construed to refer to injuries for which the city would have been liable if caused by negligence, mismanagement, or fault on its part. The judgment of the superior court is affirmed.

CONTRACTS — PRIVACY.— Where a company, organized to supply the inhabitants of a city with water, contracted with the municipal authorities to supply their hydrants, but failing to do so, the fire department was not able to extinguish a fire, there was not such privity of contract, as between the water company and an owner of city property destroyed by the fire, as to make the former liable in damages to the latter: *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; 33 Am. Rep. 1, and particularly note 5-9.

A case apparently similar to the principal case was that of *Paducah Lumber Co. v. Paducah Water Supply Co.*, decided in the court of appeals of Kentucky. The judgment of the trial court against the water company was affirmed in the court of appeals. On application for a rehearing, the court expressed its opinion March 18, 1890, as follows: "It is not necessary to even consider whether a municipal corporation can be made liable for destruction by fire of property of its individual inhabitants, because that question is not before us. But even assuming no action could be maintained in that case, still the doctrine of *respondet superior* would not, as contended, avail to relieve appellee of its own liability because the relation of principal and agent does not exist in any sense between the city of Paducah and it. On the contrary, they entered into a contract by which, for a valuable consideration, to be paid by taxation and by rents for private use of hydrants, appellee agreed, among other things, to keep a specified quantity of water in its stand-pipe at all times, except on particular occasions mentioned, none of which existed when appellant's property was burned. It is too plain for discussion that the city of Paducah had the power and did make the contract for benefit of its inhabitants, and consequently each one of them has a right to sue and

recover for an injury caused to him by breach of it. Appellee did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer. But it did undertake to perform the plain and simple duty of keeping water up to a designated height in the stand-pipe. And if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of appellant's property, which involves questions of fact for determination of the jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract. Petition for rehearing overruled." It will be seen from the foregoing opinion that no attempt was made in it to answer the reasoning of the principal case and others in harmony with it. The court, with the ever-convenient "it is too plain for discussion," summarily disposed of the question, and then directed that its opinion be not officially reported. Nevertheless we do what we may towards rescuing the opinion from the oblivion to which the court consigned it, not because it exhibits any clear comprehension of the character and importance of the questions of law involved, but because of the intrinsic importance of the subject, and the fact that the Kentucky court took a different view and reached an opposite conclusion from the other courts by which the question has been considered and determined.

BEARD AND SONS v. ILLINOIS CENTRAL R'Y CO.

[79 IOWA, 518.]

COMMON CARRIERS — DUTY AS TO GOODS CARRIED. — A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise due diligence to protect them from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted.

COMMON CARRIERS — DUTY TO PROTECT GOODS. — A common carrier receiving goods for transportation must guard them from destruction by the elements, from the effect of delays, and from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those inherent in the nature of the goods, and which cannot be, in the exercise of diligence, averted, will not render the carrier liable. Hence the nature of the goods must be considered in determining the carrier's duty.

COMMON CARRIERS — DUTY AS TO PERISHABLE GOODS. — A common carrier who has knowingly received butter for transportation must exercise the care and diligence necessary to protect it from heat, and carry it in improved cars, if such cars are in use and will protect it, and cannot escape liability for not safely transporting on the ground that it did not have cars sufficient for that purpose; that the car was sealed when received; that it was customary to haul cars received from the connecting carrier without changing the goods in them, or that the rate of charges, as shown by the way-bill, was for common cars only.

COMMON CARRIER — FREIGHT CHARGES AS LIMITING LIABILITY. — Freight charges for perishable goods will not limit the care to be exercised by the carrier in transportation, nor restrict his liability, unless the charges fixed in the way-bill express a contract that the goods may be carried so as to

destroy their value, and that excuses the carrier from the exercise of the care required of him by law.

COMMON CARRIERS — EVIDENCE OF WANT OF CARE. — In an action against a common carrier to recover for the loss of a car of butter, and alleging negligence on his part for not taking proper precautions to preserve it during transportation, evidence is admissible to show a custom among carriers to put butter in cold storage, when refrigerator-cars were not ready to receive it.

COMMON CARRIERS — PRESUMPTION AS TO CONDITION OF GOODS — BURDEN OF PROOF. — The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of a connecting carrier, and the burden of proof is on him to show that they were not in good condition when received by him.

INSTRUCTIONS — ISSUE UPON WHICH THERE IS NO EVIDENCE need not be submitted to the jury.

ACTION to recover damages for injury to a car-load of butter arising from heat during transportation. Judgment for plaintiff, and defendant appeals.

Mills and Keeler, and W. J. Knight, for the appellant.

Rickel and Crocker, for the appellees.

BECK, J. 1. The plaintiff delivered to the Burlington, Cedar Rapids, and Northern Railway Company, at West Union, in two consignments, a large quantity of butter for transportation to New Orleans. The facts as to both separate consignments are identical. In the further statement of facts they will be referred to as but one transaction. The butter was put in refrigerator-cars by the company first receiving it, and was transported therein over connecting roads to St. Louis, where it was transferred by drays across the river, and delivered to the St. Louis, Alton, and Terre Haute Railway Company, known as the Cairo Short Line, and put in a common box-car and a lined fruit-car, each of which was sealed, as is usually done, and sent on the same day to Duquoin, Illinois, and delivered to defendant, which transported it to New Orleans in the same cars. The butter was not examined by defendant, and no attempt was made to ascertain its condition, on the probability that it could or would not be transported in the cars, without injury, to New Orleans. The Cairo Short Line Company billed the butter to New Orleans at a rate of freight charges for common cars. It appears that the consignment took the usual course of transaction between defendant and the Cairo Short Line at Duquoin. It is not shown that plaintiff, or the initial or connecting carrier, made any demand of defendant or the Cairo Short Line Company for a refrigerator-car, or for

the protection of the butter from the effects of heat by the use of ice in the common car in which it was transported, and it is not shown that plaintiff, or the initial carrier, or the connecting companies to St. Louis, had any notice or information in any way, directly or indirectly, of the shipment of the butter without protection from the effects of the heat, nor did they have any notice or information of the practice and course of business adopted by defendant and the Cairo Short Line at Duquoin. We are required to determine whether, under the law upon these facts, the defendant is liable. The discussion of this question will dispose of certain objections made by the counsel of defendant to the rulings of the court below upon instructions and admissions of evidence.

2. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for transportation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those which are inherent in the nature of the goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight-bills, or by other papers accompanying the shipment.

In the case before us the marks on the packages and the way-bill disclosed that the subject of shipment was butter. The employees of defendant were endowed with intelligence which taught them that the season was summer, when

warm weather prevailed; that butter, in common cars, would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employees had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter. These views are supported by the following among other cases: *Hewett v. Chicago etc. R'y Co.*, 63 Iowa, 611; *Sager v. Portsmouth etc. R. R. Co.*, 31 Me. 228; 50 Am. Dec. 659; *Hawkins v. Great Western R. R. Co.*, 17 Mich. 62; 97 Am. Dec. 179; *Great Western R'y Co. v. Hawkins*, 18 Mich. 427; *Ogdensburg etc. R. R. Co. v. Pratt*, 22 Wall. 123; *Wing v. New York etc. R. R. Co.*, 1 Hilt. 231; *Merchants Dispatch etc. Co. v. Cornforth*, 3 Col. 280; 25 Am. Rep. 757. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see *Hutchinson on Carriers*, sec. 294; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 525; 34 Am. Rep. 191; *Steinweg v. Erie R'y Co.*, 43 N. Y. 123; 3 Am. Rep. 673.

3. But it is said, — 1. That defendant did not have refrigerator-cars which it could have used on the day it received the butter; 2. That the cars were sealed; 3. That it was accustomed to haul the cars received from the Cairo Short Line without changing the cargo. We may here assume that defendant will be excused from using refrigerator-cars. But it is shown that the butter could have been carried safely by the use of ice in the box-cars. It was defendant's duty to use it. But having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose: *Hannibal etc. R. R. Co. v. Swift*, 12 Wall. 262; *Helliwell v. Grand Trunk R'y Co.*, 7 Fed. Rep. 76; *Paramore v. Western R. R. Co.*, 53 Ga. 385. The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence: *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538. The custom of the defendant and Cairo

Short Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them, when their safety demanded it, would be a custom based upon negligence, and cannot be regarded or enforced: *Hamilton v. Des Moines etc. R. R. Co.*, 36 Iowa, 31; *Allen v. Burlington etc. R'y Co.*, 64 Iowa, 95.

4. It is said that the rate of charges, as shown by the way-bill, was for common cars, and the defendant therefore undertook to furnish no other kind. If the freight charges fixed in the way-bill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the way-bill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods: *Sumner v. Southern R. R. Ass'n*, 7 Baxt. 345; 32 Am. Rep. 565. Many of the rulings of the district court upon the admission of evidence and instructions objected to by defendant are in accord with the views we have expressed.

5. Evidence was admitted, against defendant's objection, tending to show that a custom prevailed among carriers by railroads to put butter into cold storage, when refrigerator-cars were not ready to receive it. This evidence was objected to, on the ground that the petition contained no allegation of negligence by reason of the failure of defendant to put the butter into cold storage. But the petition does charge negligence on the part of defendant in not taking proper precautions to preserve the butter. The evidence tends to show what precautions ought to have been taken in this case. Besides, the evidence serves to show that defendant's excuse for sending the butter in the common car, and for not retaining it until a refrigerator-car on defendant's road came along, is not sufficient. It is shown that such car was run on defendant's trains on two or three days each week.

6. The superior court, in the seventh instruction given, directed the jury that they could infer that the butter was in good order when received by defendant, from the fact that it was shipped in good condition, in a refrigerator-car, for St. Louis. Of this instruction defendant com-

plains. It is correct. The presumption arises that goods shipped in good order continue in that condition when in the hands of a connecting carrier. The burden rests on such carrier to show that they were not in good condition when received by him: *Hutchinson on Carriers*, sec. 761; *Shriver v. Sioux City etc. R. R. Co.*, 24 Minn. 506; 31 Am. Rep. 353; *Leo v. St. Paul etc. R'y Co.*, 30 Minn. 438; *Laughlin v. Chicago etc. R'y Co.*, 28 Wis. 204; 9 Am. Rep. 493; *Dixon v. Richmond etc. R. R. Co.*, 74 N. C. 538; *Paramore v. Western R. R. Co.*, 53 Ga. 385.

7. The defendant, in its answer, set up as a defense that plaintiffs had fully compromised this claim for loss of the butter with preceding connecting carriers transporting the butter to defendant. The court withdrew the issue upon this defense from the jury, on the ground that there was no evidence supporting the defense. Of this ruling the defendant now complains. The court, we think, ruled rightly. The evidence totally fails to show a settlement. The most that could be said is, that the evidence shows propositions for settlements, and agreements to settle. But it is not shown, as is alleged in defendant's answer, that there was in fact a settlement and payment thereon, and a discharge of the claim. The action of the court in this regard is correct. The foregoing discussion disposes of all the questions requiring consideration in this opinion. The judgment of the district court is affirmed.

CARRIERS OF GOODS — DUTY OF CARRIER TO CARE FOR GOODS. — As to a carrier's duty to prevent delays in the transportation of goods, and its liability for a loss or deterioration in the goods in consequence thereof, see extended note to *Norris v. Savannah etc. R'y Co.*, 11 Am. St. Rep. 360-366. By common law a carrier of goods is regarded as an insurer, and is held accountable for any loss or damage to them, unless from inevitable accident, which is the same thing with an act of God, or the act of the public enemy, or the conduct of the owners: *Lewis v. Ludwick*, 6 Cold. 368; 98 Am. Dec. 454. The carrier must use that care which the occasion and the goods committed to him for transportation demand: *Wolf v. American Exp. Co.*, 43 Mo. 421; 97 Am. Dec. 406, and note.

CARRIERS — TRANSPORTATION OF BUTTER. — A carrier undertaking to carry butter a long distance in warm weather must carry it in refrigerator-cars; and where there is no stipulation as to what kind of cars should be used, the carrier must use such cars as are necessary for the proper transportation of the butter: *Beard v. St. Louis etc. R'y Co.*, 79 Iowa, 528.

VANNEST v. FLEMING.

[79 IOWA, 633.]

WATERS — RIGHT TO DRAIN LAND BY TILES. — The owner of the dominant estate may drain the water falling upon his land, by means of underground tiles, into a natural drainage channel upon his land, through which it is cast upon the lower or servient estate.

WATERS — DRAINAGE BY ACQUIESCENCE — RIGHT TO DAM. — Where a drainage ditch upon their respective lands has been established by two adjoining proprietors, either by express agreement or by mutual acquiescence, and such ditch is required by the best interests of both proprietors, and the manner of its construction is in accord with the natural flow of the water, which is not diverted, nor the quantity increased, it cannot be dispensed with, nor its course changed by means of a dam, without the consent of both proprietors, and the rights thus acquired pass to their grantees.

WATERS — DRAINAGE BY AGREEMENT — RIGHT TO CHANGE. — Where adjoining land-owners have jointly constructed a drainage ditch over their lands, under an oral agreement as to its course, and each has contributed labor and money in its construction, afterwards plowing and farming in accord with it, neither can set it aside, without the consent of the other.

WATERS — DRAINAGE BY LICENSE. — The assent of a land-owner to the construction of a drainage ditch over his land is in the nature of a license, which, having been accepted, and the rights conferred assumed and exercised, cannot be set aside or disregarded.

John F. Lacey, W. R. Lacey, and Bolton and McCoy, for the appellant.

Blanchard and Preston, for the appellee.

BECK, J. 1. The petition is in two counts. The first alleges that plaintiff owns 160 acres of land, and defendant owns an eight-acre tract adjacent thereto, on the west; that for many years there has been upon plaintiff's land a natural drain, or open ditch, two or three feet deep, being a natural watercourse, which begins near the center of the track, and runs in a southwesterly direction, crossing the division line of defendant's land about twenty rods north of the southwest corner thereof, and thence across it; that this drain or watercourse is the natural outlet of the water falling and accumulating upon a part of plaintiff's land, and is the natural drainage thereof; that defendant dammed up the drain at or near its entrance upon defendant's land, but the dam was washed out by the floods, and defendant threatens to rebuild it; and that the water arrested in its flow off of plaintiff's land, and caused to remain thereon by the dam, would prove

to be a source of great injury thereto, which would prove irreparable if the dam be permitted to remain.

The second count alleges that plaintiff and defendant, at the time being owners of their respective tracts of land, entered into an oral agreement that plaintiff should cause an open ditch to be dug, other than the one referred to in the first count, which should run westerly from the northwest part of plaintiff's land, and cross the line of defendant's land about thirty rods south of the northeast corner thereof, and should run thence upon defendant's land according to lines and distances set out in the petition, which need not be repeated here; that the parties should unite in constructing this ditch, each doing a part of the work, as stated in the petition; that each party was to have the right to connect tile drains with the ditch; and that defendant threatens to destroy the ditch or drain, and render it useless, which would work great injury to plaintiff. The defendant, in answer to the first count of the petition, after denying, generally, all allegations thereof, admits the existence of the ditch described in the first count of the petition, but alleges that it is not a natural watercourse, but an artificial ditch. He admits that he obstructed the ditch, but denies that the flow of the water was thereby interfered with, and alleges that plaintiff's land, at the place in question, is higher than defendant's land; that the ditch is not necessary for the proper drainage of plaintiff's land, the natural depression of the land being sufficient therefor; that it is his intention to fill up the ditch on his own land, but not to obstruct the flow of the water upon plaintiff's land; and that the ditch, with steep banks, is an injury to defendant's land.

In answer to the second count of the petition, defendant admits that the other ditch—the more northerly one—was dug at the mutual expense of the parties, pursuant to a verbal agreement made by the parties, which did not provide how long it should remain, but that it should be tiled in the future, if defendant so required, and that the ditch was not dug in compliance with the agreement. It is alleged that defendant now requires the ditch to be tiled, one half of the expense whereof he proposes to pay.

Defendant, in a cross-petition, prays that plaintiff may be enjoined from collecting the water into the ditch described in the first count by tile drains, and thereby causing it to flow upon defendant's land. The cross-petition contains allega-

tions in this language: "That defendant's land is lower than plaintiff's, and that the plaintiff's surface is drained naturally upon defendant's land, but that plaintiff has no lawful right, by drainage, to concentrate the underground water and to cause it to flow from a single point upon defendant's land, and that by so doing he has attempted to impose upon defendant's land a burden which it is not required by law to bear." The allegations of the cross-petition are denied by plaintiff in a proper pleading. Upon the final hearing on the merits, the court found the equities with defendant upon the first count of the petition, which was dismissed by the decree; and upon the second count the equities were found with plaintiff, and the relief prayed for thereon was granted. The defendant's cross-petition was dismissed.

2. The evidence and the pleading show that plaintiff's land is the higher, and is naturally drained over defendant's land by two "sloughs," as they are called in the pleadings ("swales" is a better designation), which run from or through plaintiff's land to and over defendant's. There is no other way of carrying the surplus water, caused by snow and rains, off of and away from plaintiff's land, except through these swales. They also drain defendant's land, which has no other drainage. The case is not one of water, which would not naturally run upon defendant's land, being diverted and brought there by the unlawful acts of plaintiff, but is simply the case of the natural drainage of a tract of land through the swales, prepared by nature for that very purpose. The two parties happen to own this tract of land; and the defendant, the owner of the servient estate, attempts to resist the undoubted right of plaintiff, the owner of the dominant estate, to have the surplus water falling upon his land conducted by nature's waterway off of his land to the brook, the creek, and the river,—the great natural drains of the country. The ground of this resistance is, that this water from plaintiff's land passes over defendant's farm. But as the water from defendant's land must pass over his neighbor's lands below him, which are servient to his lands, he is attempting to impose restrictions upon plaintiff which, with the same claim of right, could be imposed upon him with equally disastrous results.

It is insisted that plaintiff is violating the law and rights of defendant by collecting the water—"underground water" it is called in defendant's pleadings—by tiles, and conducting it to defendant's land at one place, which, it is claimed, is not

permitted by the law. It will be readily seen, upon a moment's reflection, by one having but a limited acquaintance with the subject, upon the consideration of the facts developed in the evidence, that there is no difference between underground water collected by tiling, and surface water. The first is water which would run off in a ditch, were one dug, without entering the earth. But it is permitted to enter the earth, and is then, by natural means, attracted and conducted to the tiles, and through them flows away. It must be remembered that the lands of both parties are used for cultivation with the plow. The fact is known by every intelligent observer who has directed his eyes over the surface of our beautiful and fertile agricultural lands, that the swales are our most productive lands, while the sward of the prairie grass, and of other natural grasses, remains unbroken. There are no ditches or gutters in the swales. They, of course, are of various widths, depending largely upon the abruptness and height of the little hills or elevations of which they constitute the valleys. When the sward is broken by the plow, the water from rains and snows has a tendency to seek a channel down the swale, which will, of course, be no wider than is required to conduct away the surplus water falling on the land drained by the swale. This channel will soon become a ditch after the sward is broken; and if left to nature, it will be sinuous, directed by the laws of nature, which give all water-courses that character. But the intelligent husbandman will aid water in this regard, and with his plow or his shovel will keep the ditches straight. He will not act the foolish part of attempting to do that which is impossible, namely, to keep the surplus water flowing over all the surface of the swale; for the reason that it would prove impossible, and if successful, it would cost him his crops, and finally impoverish his land, by causing the fertile soil to be washed away. In the case before us, both parties, if they be intelligent farmers, do this very thing. Plaintiff, instead of an open ditch, put in tile, which subserves the same purpose. Now, these farmers are not diverting the water from the water-way provided by nature. They are not seeking to conduct the water contrary to the course of nature, or in a way it did not run before the soil became the property of man. When the use of the soil is changed from nature's husbandry, the production of grasses from meadows and pastures to the cultivation of grain by means of the plow, nature continues to direct the water in channels. The

plaintiff does not conduct the water to and upon defendant's land in a manner differing from that manner in which it was conducted before the land was plowed. The manner, in each instance, is nature's manner. Of course, the manner, in one instance, under the laws of nature, provides for a ditch; in the other instances, the laws of nature under which was produced the sward of the prairie grass, dispense with a ditch.

3. It is shown by the evidence—indeed, defendant himself so testifies—that the ditch referred to in the first count was made upon defendant's land, before he owned it, by the farmer who then owned and cultivated the land. It seems that defendant's grantor and the plaintiff, or his grantor, were in accord in their views as to the ditch, and its course through the two tracts of land, and, either by express agreement or by mutual and silent acquiescence in the manner pursued by each in the improvement, by drains, of their respective lands agreed upon the construction of the ditch and the line it should pursue. Its place of crossing the dividing line of the lands in this manner was settled. The law will not permit complaint to be now made of the location and manner of construction of the ditch, after it has been acquiesced in by the parties. The rights of the parties demand that the ditch should remain a settled matter. Good husbandry forbids the changing of ditches. Their permanence prevents the washing away of the soil, as well as avoids expenses in the change.

4. Upon the first count of the petition, and defendant's cross-petition, we reach the conclusions,—1. That the ditch is required by the best interest of both proprietors; 2. That the manner of its construction is in accord with the natural flow of the water; 3. That the quantity of the water has not been increased, and its flow has not been diverted, as charged; 4. That the ditch was established by the acquiescence of the proprietors, and that defendant threatens to interfere with and change the flow of the water by building and maintaining a dam in the ditch; 5. That the ditch cannot be dispensed with, nor its course changed, without the consent of the parties interested. This conclusion is in accord with the doctrines of *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, and is supported by familiar principles of the law: See *Pratt v. Lamson*, 2 Allen, 275.

5. The evidence very plainly leads to the conclusion of fact that the ditch described in the second count was constructed

jointly by the parties, under an oral agreement as to its course, etc., each party contributing labor or money to constructing it. The parties have recognized the ditch, have plowed and farmed in accord with it, and have expended money and labor in the performance of the contract. It can be set aside, disregarded, and annulled by neither without the consent of the other. The assent of defendant to the construction of the ditch on his land is in the nature of a license, which, having been accepted, and the rights conferred assumed and exercised, cannot be set aside or disregarded: *Harkness v. Burton*, 39 Iowa, 101; *Cook v. Chicago etc. R'y Co.*, 40 Iowa, 451; *Anderson v. Simpson*, 21 Iowa, 399; *Beatty v. Gregory*, 17 Iowa, 109; 85 Am. Dec. 546.

6. These considerations lead us to the conclusion that the decree of the district court ought to be affirmed as to the second count and as to the dismissal of defendant's cross-petition, and reversed as to the dismissal of the first count of the petition. A decree ought to have been entered granting the plaintiff all the relief prayed for in his petition, both upon the first and second counts, and dismissing the cross-petition of defendant. The cause will be remanded to the court below for such a decree.

Modified and affirmed on defendant's appeal; reversed on plaintiff's appeal.

WATER — RIGHT OF DRAINAGE. — The upper land-owner may carry on his agricultural operations in the ordinary manner of a good husbandman, without liability for such drainage or obstruction as may incidentally result therefrom; but he must not construct works, drains, or ditches, whose direct object is the flooding of the lands of the lower proprietor, although he thereby fits his own lands for useful cultivation: Note to *Martin v. Jett*, 32 Am. Dec. 125 et seq., where this question is considered. Compare *Gregory v. Bush*, 64 Mich. 37; 8 Am. St. Rep. 797.

KILLMER v. WUCHNER.

[79 IOWA, 722.]

PARTITION — ALLOWANCE FOR IMPROVEMENTS. — A party who, owning an undivided one third in fee and a life estate in the whole of a tract of wild land, takes possession under a deed purporting to convey the remaining interest in the fee, but which is afterwards determined to be void, and who, while thus in undisturbed possession for twenty years, makes improvements equal to the value of the land, is entitled, in an action of partition brought by him upon discovering the defect in his title, to recover the value of his improvements; and though actual partition cannot be decreed, and a sale must be made, still he need not resort to a court of law to recover the value of his improvements.

Mackey and Stockman, for the appellants.

C. G. Johnston, for the appellee.

ROBINSON, J. The title to the land in question was considered and determined in *Killmer v. Wuchner*, 74 Iowa, 360. This action was brought for a partition of the land. Plaintiff asks that, in determining the respective interests of the parties to this action, the improvements upon the land be considered, and that an allowance therefor be duly made. Before this action was commenced, plaintiff sold, and agreed in writing to convey, the premises in controversy to John Beinke, and he is made a party defendant. The appellants ask for the partition of the real estate, but insist that their interest is not affected by the improvements. The defendant Beinke admits the contract of purchase with plaintiff, and avers that it is an entirety, and that he does not desire to take only a part of the land. He also alleges that he has placed thereon improvements to the value of \$675, and asks that in case a sale is ordered, the plaintiff's share of the proceeds thereof be paid into court until an adjustment is effected between himself and the plaintiff. To the answer of Beinke, appellants plead that the improvements for which he claims were made without their knowledge or consent, and with knowledge of their rights. The court below found that each appellant was the owner of an undivided four twenty-fifths of the premises in controversy, including the improvements, subject to a life estate of Dorothea Strohmman, now held by Beinke, and that Beinke was the owner of an undivided seventeen twenty-fifths of the premises, including improvements and the life estate aforesaid. It was ordered that the premises be sold, and seventeen twenty-fifths of the proceeds be paid to Beinke, and that the remainder be invested under the direction of the court; that the interest thereof be paid to Beinke during the life of Dorothea Strohmman, and at her death that such remainder should be paid to appellants.

1. Appellants contend that the court erred in making an allowance against them for improvements made by appellee. Numerous authorities are cited which hold, in effect, that a tenant for life cannot charge the inheritance or remainder estate with the cost or value of improvements; and for the purposes of this case, that may be conceded to be the general rule. The question we are required to determine is, whether the facts of this case make it an exception to that rule. The land in

controversy was purchased from the general government by the father of appellants, who died testate, and a non-resident of Iowa, in the year 1854. He devised to each of the appellants an undivided one third of the land in question, subject to an estate in the mother: *Killmer v. Wuchner*, 74 Iowa, 360. By a decree of the Keokuk circuit court rendered December 31, 1886, from which the appellants in this case did not appeal, that estate was determined to be a life estate in the shares of appellants, and an undivided one third in fee-simple. In the year 1862, the grantor of plaintiff obtained from the step-father of appellants, who were then minors, a deed which recited that the step-father was their guardian, and which purported to convey the land. It was insufficient as a conveyance, but the evidence satisfies us that it was received in good faith, and relied upon and treated as effectual to pass the title of appellants. In the year 1864, plaintiff's grantor acquired the interest devised to the mother, and in the year 1866 he executed to plaintiff a warranty deed for the entire tract of land. Valuable improvements were made upon it, and there is no doubt that plaintiff occupied and treated the premises as his own until the year 1884, when he sold them to Beinke without any knowledge of appellant's claims. When that sale was made an investigation of the title led to a discovery of the claims of appellants. At that time one of them was about thirty-two years of age, and the other was two years younger, and neither had ever resided in Iowa. They did not know of their interest in the land, nor the improvements thereon, until about October, 1884. Beinke first learned of the defect in his title nine months after he had entered into the agreement of purchase, and as we understand the record, after a large part, if not all, of the improvements had been made. Certainly, all of much value was made before there was any adjudication of his title. It is true, appellee could have ascertained the interests of appellants before making the improvements, but the improvements were made in good faith, and equal in value the worth of the land without them. When made, appellees were rightfully in possession of the land, and only did that which was proper to develop and make it productive. It was taken in a wild, uncultivated state, and by means of the improvements in question was fitted for residence, and made capable of yielding valuable profits. It cannot be partitioned, but must be sold, and the proceeds divided. Appellants have not been injured by the making of the improvements, and they

have no just claim to any portion of their value. They will receive the same amount in value under the decree of the district court that they would have received had the improvements not been made, and with that they should be satisfied. Our conclusion is in harmony with the principles of equity, and is not without support of authorities: See *Thorn v. Thorn*, 14 Iowa, 55; 81 Am. Dec. 451; *Carver v. Coffman*, 109 Ind. 547; *Cooter v. Dearborn*, 115 Ill. 509; *Ford v. Knapp*, 102 N. Y. 135; 55 Am. Rep. 782; 2 Greenl. Ev., sec. 549, note 1; Freeman on Cotenancy, sec. 509.

2. Other questions are discussed, but evidently not relied upon, by counsel for appellants. It is suggested that the relief demanded by plaintiff, and given to them by the district court, should have been sought in an action at law, under the occupying-claimant act. But a court of equity, having acquired jurisdiction of the case, has power to afford all proper equitable relief which is demanded. *Green Bay Lumber Co. v. Ireland*, 77 Iowa, 636. It is said that the questions involved in this case could have been adjudicated in the case of *Killmer v. Wuchner*, 74 Iowa, 359. That was an action to quiet title, and the relief demanded in this case was not made an issue in that. Appellants ask a partition in this case, and for general equitable relief, and cannot be heard to complain because their prayer is granted. We are of the opinion that the finding of the district court as to the shares of appellants is sustained by the evidence, and is fair to them. The decree of the district court is affirmed.

IMPROVEMENTS, ALLOWANCE FOR.—One who improves land in good faith in the belief that he is the owner thereof in severalty is entitled to payment for such improvements; and his co-tenant will not be permitted to recover a moiety of such land, except upon condition that he pays his share for such improvements; and this is true even though the person making the improvements had constructive notice of the plaintiff's title: *Shepherd v. Jernigan*, 51 Ark. 275; 14 Am. St. Rep. 50.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**THE JOHN SPRY LUMBER COMPANY v. THE SAULT
SAVINGS BANK LOAN AND TRUST COMPANY.**

[77 MICHIGAN, 199.]

MECHANIC'S LIEN LAW UNCONSTITUTIONAL WHEN.—A mechanic's lien law enacted for the sole purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, and leaves the law as it was before its passage.

PROCEEDINGS under mechanic's lien law. The opinion states the case.

Sutton and Martin, and Shepard and Lyon, for the appellant.

John H. Goff, H. M. Oren, and Hayden and Young, for the defendants.

CAMPBELL, J. Plaintiff sued, counting expressly on the lien law (act No. 270, Laws 1887), claiming a lien on the banking-house of the principal defendant, for lumber furnished the defendants Myers, and used in its construction.

The Savings Bank Loan and Trust Company made a written contract with the defendants Myers June 27, 1887, to begin by July, 1887, and finish by November 1, for twenty-seven thousand dollars, the building in question, payable on monthly estimates, with the usual drawback of twenty per cent to be held till completion. The court below held the lien law of 1887 to be unconstitutional, and gave judgment on the personal debt against defendants Myers, who do not appeal. Plaintiff appeals on account of the denial of the lien.

The law of 1887 repeals all previous laws on the subject, and only saves pending proceedings. But it is assumed, and correctly, to apply to all material furnished after the law took effect, whether under old or new contracts. It changes the old law chiefly in regard to the cases under which liens may be created, and does so in such a way that it must stand or fall together. The changes are all in one direction, and upon one theory. The machinery is merely secondary and incidental. The new law varies from the old law in these important particulars: —

1. It allows a homestead to become bound to the persons claiming a lien, where a building contract is executed with the original contractor, signed by husband and wife.

2. It binds a married woman's land, where the articles or labor are furnished to a contractor or subcontractor of the husband, with her knowledge or consent, express or implied, as if by her own express authority; and furnishing labor or materials "in an open and public manner" is made sufficient evidence of knowledge and consent.

3. The building contract made with any person, whether man or woman, has no effect on the lien, whether fully performed by the land-owner or not; and the laborer or furnisher may enforce his lien for any material or labor furnished under any contract, express or implied, written or unwritten, whether conforming to the original contract or not.

In short, this law makes the mere fact that a building contract exists, or has existed, a sufficient reason for binding the land for any act or omission of the building contractor or his subcontractor, whether within the range of the contract or not, or whether or not in harmony with its terms. The law (section 2) says, in so many words: "Such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made or for which such materials are furnished, and the original or any subcontractor, by any payment made by such owner, part owner, or lessee to such contractor or subcontractor, for the contract price of such labor or material [materials], or any part thereof, in case the person performing such labor or furnishing such material shall comply with the provisions of this act."

This statute is made for the express, and so far as differing from former laws for the only, purpose of enabling strangers to the title to subject it to sale for obligations to which the

owner never became bound, and in which he has no part whatever. It strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer. And as this purpose forms the only apparent reason for repealing the old law and passing the new one, the present statute, and all its parts, must fall together, leaving the law of the state where it was before the law of 1887 was passed. In *Hanes & Co. v. Wadey*, 73 Mich. 178, the validity of the law was not discussed, as it has not been in any other case hitherto.

The judgment must be affirmed, with costs.

THE PRINCIPAL CASE HAS BEEN CITED AND FOLLOWED in *Mellis v. Race*, 78 Mich. 80, *Snell v. Race*, 78 Mich. 334, both cases having been brought under the mechanic's lien law which is held to be unconstitutional in this case.

THE MINNESOTA MECHANIC'S LIEN LAW of 1887, section 5, making the fact that the person who performed the labor or furnished the material was not enjoined by law by the owner from so doing conclusive evidence that the labor was performed or the material furnished, is unconstitutional. No man can be deprived of his property without his consent or by due process at law. *Meyer v. Berlandt*, 39 Minn. 438; 12 Am. St. Rep. 663.

CONNECTICUT FIRE INSURANCE COMPANY v. KINNE.

[77 MICHIGAN, 231.]

AMENDMENT OF DECLARATION INTRODUCING NEW CAUSE OF ACTION NOT ALLOWABLE. — A declaration counting upon a written contract of insurance, and claiming damages for the breach of that contract in the failure or refusal of the defendant to pay the amount of the insurance upon a loss by fire, cannot be amended so as to claim damages for the refusal of the defendant to deliver a policy of insurance in conformity to a verbal agreement by which the plaintiff was deprived of the insurance upon his goods for which he contracted. These are two independent and distinct causes of action. (Sherwood, C. J., dissenting.)

MISTAKE CANNOT BE CORRECTED BY AMENDMENT IN COURT OF LAW WHEN.

—A declaration upon an insurance policy containing a clause "that there shall be a clear space of two hundred feet between staves and heading and mill" cannot be amended in a court of law so as to eliminate this clause, under an allegation that it was inserted either through mistake or fraud, and was never assented to by the insured.

MANDAMUS. The opinion states the case.

Norris and Norris, for the relator.

Cramer and Corbin, for the respondent.

MORSE, J. Neil O'Donnell and Hugh O'Donnell, composing the firm of N. & H. O'Donnell, brought suit in *assumpsit* in the Monroe County circuit court against the Connecticut Fire Insurance Company. The suit was commenced by summons. A declaration was filed, to which the defendant company filed a plea of the general issue. A trial was had, and judgment rendered, in favor of the plaintiffs, February 21, 1888, for the sum of \$1,083.48. The case came to this court, and the judgment was here reversed, and a new trial granted. It will be found reported in 73 Michigan, 1.

The declaration was upon the policy as it read. The case was treated on the trial in the court below as a suit upon a contract for insurance, as claimed by the plaintiffs, which differed materially from the contract as contained in the policy of insurance. The property insured is described in the policy as follows, with the insurance taken thereon: "One thousand dollars upon their stock of staves and heading, contained in sheds and open yards; two hundred dollars upon frame barrel-house; two hundred dollars upon cooper stock therein, — all situated in yard east of and adjacent to their stave and heading mill, situate at Dundee, Monroe County, Michigan."

The policy also contained the following, among other clauses: "Other insurance permitted. It is guaranteed that there shall be a clear space of two hundred feet between staves and heading and mill."

The property burned was a quantity of heading, of the value of one thousand dollars. It was conceded on the trial and in this court that the property, when burned, was not two hundred feet from the mill; but it was located in the same place as when insured, and the agent of the insurance company knew its location at the time of taking the insurance. The plaintiffs were allowed to recover in the circuit court upon

the theory that the company agreed to insure this heading in their yard just where it stood, and that the condition as to the two hundred feet space was put in the policy without the knowledge or consent of the plaintiffs, and that they knew nothing of such insertion until after the fire, when they for the first time examined the policy; that the clause was a mistake or a fraudulent interposition; that plaintiffs paid the insurance company the premium in good faith, upon the order they gave for the insurance of their property as it stood; and that they were therefore entitled to the benefit of their contract as made. We held that this theory was not permissible under the declaration filed in the cause.

After the decision in this court, and on January 17, 1889, a *remittitur* was filed in the court below, and the cause, March 12, 1889, noticed for trial for the April, 1889, term of that court by defendant. March 14, 1889, plaintiffs entered a motion for leave to file an amended declaration, and filed a copy of their proposed declaration as amended. Upon a hearing of this motion, which was resisted by the defendant, the circuit judge made an order granting the motion. A motion was then made to vacate this order, which was denied. We are now asked to compel by *mandamus* the vacation of the same.

The amended declaration is in two counts. The first count sets out an oral contract for insurance, substantially as plaintiffs claimed they had established it on the first trial. It alleges that plaintiffs made a verbal application to defendant for insurance; that in response to said application the agent of the defendant called at plaintiffs' place of business, and there examined all the property to be insured, which was pointed out to him; that he then and there saw the property, and knew its location with respect to the stave-mill, and, after such examination and designation, well knowing its location he contracted on behalf of said defendant to insure said property for the sums hereinbefore stated, in consideration of twenty-eight dollars then and there paid by plaintiffs to defendant, for one year, and also agreed that defendant would issue a policy of insurance to plaintiffs in accordance with said contract; that defendant did not deliver the policy as agreed, but delivered a policy containing this clause: "It is guaranteed that there shall be a clear space of two hundred feet between staves and heading and mill."

Plaintiffs further allege that at the time said defendant inspected the property, as before stated, said staves and

heading were not two hundred feet from plaintiffs' mill, and such fact was known by the defendant at the time of the making of the contract for insurance, and that the clause in reference to the two hundred feet clear space was written in the policy delivered by said defendant either through mistake or fraud, and without the consent or knowledge of the plaintiffs.

Plaintiffs aver that they never knew of or consented to this clause in the policy, and that such clause is a fraud upon them; that they relied upon the contract as made by them, and did not examine or read said policy until after the burning of said staves and heading. The destruction by fire of the staves and heading is then alleged, whereby the plaintiffs claim damages in the sum of one thousand dollars, "by reason of the defendant not performing its said contract and agreement for insurance so made with the plaintiffs as aforesaid, and by not executing and delivering to the plaintiffs a policy of insurance therein, and thereby insuring the plaintiffs against loss or damage by fire upon said property, according to the terms of said contract and agreement for insurance so made as aforesaid, and by fraudulently inserting in said pretended policy said two-hundred-feet-clear-space clause."

The second count consists of the original declaration, with the following amendment, inserted after the allegation of the insurance of the property by a written policy of insurance, to wit: "And these plaintiffs allege that the said defendant did, at the time and place aforesaid, either through mistake or fraudulently, insert and write in said policy the following words and figures, to wit: 'It is guaranteed that there shall be a clear space of two hundred feet between staves and heading and mill'; which last words or clause was never assented to or known to be in said policy by the said plaintiffs, nor assented to by them in any way at the time of making said contract and agreement and policy of insurance; and the plaintiffs allege that they never knew of said clause in regard to the two hundred feet until after the said staves and heading were burned, as hereinafter mentioned, nor did they ever in any way consent to the same; nor should the said clause be held as a part of said policy, so far as these plaintiffs are concerned, but should be held as a mistake or fraud, as regards them."

Some minor amendments are also made to conform to this main amendment, so that the declaration becomes in fact a

claim of insurance based upon the policy issued, with the two-hundred-feet-space clause eliminated therefrom as a mistake or fraud.

It is conceded that the policy of insurance contains a limitation clause as to the bringing of suit, and it is claimed by the relator — this limit being one year, and having passed at the time the amendment was made—that if a new suit was begun, this limitation could be pleaded in bar of plaintiffs' claim; that if the amendment is allowed to stand, this right to plead is defeated; that the amendment, as allowed, sets forth a new and distinct cause of action, and therefore should not be permitted: See *Gorman v. Judge*, 27 Mich. 138; *Michigan Cent. R. R. Co. v. Judge*, 35 Mich. 227. But it is contended by the respondent that this limitation contained in the policy is not only doubtful in its validity, but could be waived by the defendant or its agent, and therefore the cases cited, which apply to the statute of limitations, are not in point here.

It seems to me that the first count of the amended declaration introduces a new cause of action. The original declaration, as before said, counted upon a written contract of insurance, and claimed damages for the breach of that contract in the failure or refusal to pay the amount of the insurance upon loss by fire without the fault of plaintiffs. The first count of the amended declaration claims damages for the refusal of the defendant to deliver a policy of insurance in conformity to a verbal agreement, by which the plaintiffs were deprived of the insurance upon their goods for which they had contracted. These are two independent and distinct causes of action, although both sound in *assumpsit*, and may be said to grow out of the same transaction. Does our statute of amendments, in the discretion of the circuit judge, allow an amendment of this character? We think not.

It is further objected to the second count in the amended declaration that it seeks to reform and alter the contract sued upon by striking out the two-hundred-feet-space clause in a court of law, and that this can only be done in equity. In this count the plaintiffs plainly sue upon the policy as it would stand with this clause omitted, and charge that such clause was inserted without their knowledge and consent, by the defendant, the relator, by mistake or fraud, and insist that they have the right to treat and sue upon said contract as if no such clause was inserted in it. If this can be done, it is clear that no new cause of action is substituted by the

amendment, and the allowance of the amendment would be properly within the discretion of the court. It would be substantially the same cause of action, the variance being only in the terms or conditions of the contract sued upon to meet the proofs as developed on the trial of the cause. If a mistake were made in setting out a contract in a declaration, as to some of its terms and conditions, there can be no doubt that the trial court would have the power to allow an amendment to be made to correct such mistake.

The only question to be considered is, whether or not this alleged mistake or fraud in the writing of the insurance policy can be corrected in a court of law in the manner here sought to be done. We are satisfied that it cannot be so corrected.

The writ of *mandamus* is therefore granted as prayed, with costs against the plaintiffs in the suit, Neil and Hugh O'Donnell.

SHERWOOD, C. J. (dissenting). I cannot concur in the opinion of my brother Morse in this case. It was never necessary that a contract of insurance should be in writing, in order to be binding upon the company after it received the premium from the insured and recognized its obligation in such manner to pay, when there had been no fraud on the part of the insured and the policy is only for the purpose of evidencing the terms of the contract. In a suit to enforce the liability of the company, it may be brought on the contract for insurance as well as upon the policy. The claim, or cause of action, is the same in both the contract and the policy. The damages, and the measure thereof, are also the same under each, and ascertained in the same way, and are recoverable in the same form of action under each, and a breach of one is always a breach of the other, as the policy must always include and be based upon the contract for insurance. The latter in fact determines the terms and conditions of the former, and the former can contain no element different from the latter. For this reason, a declaration containing a count upon the one may always be amended by adding a count upon the other, without introducing a new or different cause of action; and such I conceive to be the question in the present case, and I have no doubt of the correctness of the action of the circuit judge.

I think the *mandamus* should be denied, with costs.

PLEADING — AMENDMENT. — While one is not estopped, by bringing an action at law upon an insurance policy, from changing the action by means of amendment into an action in equity: *Barnes v. Hekla F. Ins. Co.*, 75 Iowa, 11; 9 Am. St. Rep. 450; *Zeck v. Insurance Co.*, 78 Iowa, 334; 16 Am. St. Rep. 443; even after a reversal of the judgment in his favor in the action at law: *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56; 14 Am. St. Rep. 196; an amendment is not allowable which introduces an entirely new cause of action: *First Nat. Bank of Tamaqua v. Shoemaker*, 117 Pa. St. 94; 2 Am. St. Rep. 649; *Stevenson v. Mudgett*, 10 N. H. 338; 34 Am. Dec. 155, and note; *East Line etc. R'y Co. v. Scott*, 75 Tex. 94.

BASSETT v. BUDLONG.

[77 MICHIGAN, 338.]

RESERVATION REPUGNANT TO GRANTING CLAUSE IN DEED, VALIDITY OF. —

The rule that a condition, reservation, or exception which is repugnant to the granting part of a deed is null and void applies only in cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or if ascertained, cannot be carried into effect in accordance with established principles of law.

EVERY DEED OR CONTRACT IS SUPPOSED TO EXPRESS INTENTION OF PARTIES executing it, and when its object or purpose is called in question in a court of justice, the first inquiry is, What is the intention of the parties, as expressed in the instrument? And it is the duty of the court to so construe it as to carry out the intent of the parties making it, if no legal obstacle lies in the way.

DEED WITH RESERVATION DOES NOT CONVEY FEE-SIMPLE ABSOLUTE WHEN.

— Where a husband conveys to his wife the farm upon which they reside, by a quitclaim deed purporting to convey the same to her and to her heirs and assigns forever, but containing, after the *habendum* clause, the conditions and reservations that she shall not convey or mortgage the granted premises during his lifetime without his written assent or his joining in the conveyance, and that in case of her death prior to his the premises shall revert to him and his assigns, the apparent intention of the parties as expressed in such deed is, that if the grantee dies before the grantor does, she shall have no further interest in the land; but if he dies before she does, then the title in fee-simple absolute shall pass to and become vested in her. The effect of such an arrangement is, that the title to the real estate, in the event of the death of either, goes to the survivor.

EJECTMENT. The opinion states the case.

Godwin, Adsit, and Dunham, for the appellants.

Maher and Felker, for the plaintiffs.

CHAMPLIN, J. This is an action of ejectment to recover possession of the east half of the southwest fractional quarter, and the southwest quarter of the southwest fractional quarter,

of section 18, township 5 north, range 11 west, which lands plaintiffs claim in fee.

The case was tried before the court without a jury, and upon request of the parties the court made a written finding of facts, from which it appears that on August 15, 1873, one William H. Budlong was the owner in fee of the premises, and resided thereon with his wife, Annette Budlong. He also at that time owned considerable personal property. He had no children, and on the day aforesaid executed and delivered to his wife, Annette, a quitclaim deed, therein expressed to be for "the love I have for her, as my wife, and for divers other reasons, and for the consideration of ten dollars," by which he purported to convey to his wife, her heirs and assigns forever, the premises above described. Following the *habendum* clause of the deed was the following proviso:—

"Provided always, and this indenture is made (in all respects) upon these express conditions and reservations, that is to say:—

"1. It is reserved that said party of the second part shall not, at any time during the lifetime of the said party of the first part, convey to any person or persons, by deed, mortgage, or otherwise, the whole or any part of the said premises, as above described, without the written assent of the said party of the first part, or his joining in such conveyance.

"2. It is further reserved that in case of the decease or death of the said Annette Budlong, party of the second part, at any time before the decease or death of the said William H. Budlong, party of the first part, then, in such case, and upon such decease, the said premises, as above described, with all and singular hereditaments and appurtenances thereunto belonging or in any way appertaining, shall forthwith, upon such decease, revert back unto the said William H. Budlong, of the first part, and to his assigns forever."

As originally prepared, the above deed contained the word "heirs" before the word "assigns" in the last clause, and upon its being read over to Mr. Budlong, he inquired of the scrivener who would be his heirs, as he and his wife had no children, and was told that his brothers and sisters, nephews and nieces, would be his heirs. He thereupon declared that he did not want any of them to have any of his property, and asked if the instrument could not be made so as not to mention his heirs, and was told by the scrivener that he could get rid of it by erasing the word "heirs," and Budlong directed

him to do so, which was done; and the instrument was thereupon executed and delivered, and was afterwards recorded on March 27, 1874.

Both parties continued to reside upon the premises until about April 7, 1886, at which time Annette Budlong died intestate as to said real estate, leaving no parent or child surviving her. Budlong continued thereafter to occupy the premises until June 25, 1886, when he died. Previous to his death, but the time is not stated, he made a last will, devising said lands to Bertha M. Budlong, her heirs, representatives, and assigns forever, which will was admitted to probate, and the defendant Brewer was appointed administrator with the will annexed, who took possession of the premises, and was holding the same at the commencement of this suit. The plaintiff Bassett is a brother and plaintiff Beeman is a nephew of Annette Budlong, and are the only surviving next of kin and heirs at law of her.

It is found as a fact by the circuit judge that in the spring of 1885, William H. Budlong stated to one Greeman that he did not own a dollar's worth of property there, and that the property was all his wife's. The testimony upon which this finding is based is not returned in the record, and the circumstances and occasion are not stated.

One other fact was found by the court, to wit, that on the same day the deed was executed a bill of sale of all the goods and chattels which William H. Budlong then owned was executed to Annette Budlong. The consideration was stated to be "the natural love and affection which I have and bear to my wife, Annette Budlong, and for and towards the better support and maintenance of her after my decease, and for divers other good causes, and valuable considerations to me thereunto especially moving."

The sale was made subject to a proviso therein contained, as follows: "Provided always, and these presents are upon this special trust and confidence and upon this express condition, that she, the said Annette Budlong, her heirs, executors, administrators, and assigns, shall and do permit and suffer me, the said William H. Budlong, to use, keep, and enjoy all and singular the said goods and chattels during my natural life, without paying or yielding anything for the same or in respect thereof, and not otherwise; and that from and after my decease she, the said Annette Budlong, her heirs, executors, administrators, or assigns, shall or lawfully

may have, hold, and enjoy the same, and every part and parcel thereof, and convert the same to her or their own proper use and behoof, as she or they may think fit."

This bill of sale was admitted in evidence against the objection of defendants' counsel, and constitutes one of their assignments of error.

The circuit court found, as conclusion of law from the foregoing facts, that the plaintiffs were entitled to recover.

It is urged on the part of the plaintiffs that the deed from Budlong to his wife contains an absolute grant of the real estate therein described to Annette Budlong, and to her heirs and assigns forever,—thus conveying to her the fee-simple absolute; and that the portion of the deed which restricts this absolute conveyance of the free-simple, whether it be called a "condition," "reservation," or "exception," being repugnant to the granting part of the deed, is null and void. There are many authorities to be found in the reports of decided cases which support the proposition; but we apprehend that it can only be true in those cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or if ascertained, cannot be carried into effect in accordance with established principles of law.

Every deed or contract in writing is supposed to express the intention of the parties executing it, and when the object or purpose of such deed or contract is called in question in a court of justice, the first inquiry is, What is the intention of the parties, as expressed in the written instrument? It is very plain, upon the face of the instrument, that Mr. Budlong did not intend to convey to his wife the title to the premises in fee-simple absolute. She was precluded from conveying in any manner the premises described without his written assent, or joining in the conveyance; and if she died before he did, she was to have no further interest in the land. If he died before she did, then the title in fee-simple absolute should pass and become vested. Such is the apparent intention of the parties, as expressed in the deed. It is the duty of the court to so construe the instrument as to carry out the intent of the parties making it, if no legal obstacle lies in the way.

In *Williams v. Bentley*, 27 Pa. St. 294, it was held that the strongest words of conveyance in the present tense will not pass an estate, if from other parts of the instrument the intention appears to be otherwise. In *Ogden v. Brown*, 33 Pa. St.

247, it was said: "Whether an informal instrument transferring an interest in real estate shall be held a conveyance, or only an agreement for a conveyance, depends, not on any particular words or phrases found in it, but on the intention of the parties, as collected from the whole contract": *Jackson v. Myers*, 3 Johns. 388; 8 Am. Dec. 504; *Neave v. Jenkins*, 2 Yeates, 107; *Sherman v. Dill*, 4 Yeates, 295; 2 Am. Dec. 408; *Kenrick v. Smick*, 7 Watts & S. 41; *Stouffer v. Coleman*, 1 Yeates, 393; *Earle v. Dawes*, 3 Md. Ch. 230.

We do not think it is necessary to resort to the surrounding facts and circumstances in order to discover the intent of the parties. If, however, we look to the surrounding facts and circumstances, we find them all affording evidence of the intent expressed in the instrument. By the bill of sale, executed at the same time, he bargained and sold to his wife absolutely all of his personal property, consisting of farming utensils, horses, cattle, household goods, etc., but reserved therein the use and enjoyment of all and singular such goods and chattels during his natural life, without paying anything for such use and enjoyment. When it is considered that he was a farmer and a householder, and continued his residence upon the premises until his death, and retained the use and enjoyment of his personal property, it is evident that by executing the deed to his wife he did not intend to part with the title to his real estate unless the contingency should occur of his dying before his wife died. That event did not occur, and the estate never vested in his wife. The condition in the deed that his wife should not convey or mortgage the land without his written assent or joining in the deed is a clear indication that the title should not pass, because if it was the intention that it should pass, and the estate vest in his wife, the condition would be nugatory, and no force or effect be given to this part of the instrument. To hold that the title did pass by the absolute words of the granting clause would violate that rule of construction which requires that every portion of the instrument should be given effect according to the intention of the parties. When we consider the intimate relation of the parties to the instrument, — that of husband and wife, — the effect of the arrangement entered into was that the title of the real estate should, in the event of the death of either, go to the survivor. Doubtless a simpler way to accomplish the object would have been for them to have united in a deed to a third party, and for him to have conveyed to them jointly, and then,

under the statute, the survivor would have succeeded to the whole title and estate: Howell's Statutes, secs. 5560, 5561; *Fisher v. Provin*, 25 Mich. 347; *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Allen v. Allen*, 47 Mich. 74.

It follows, from the construction we have given to the deed under which the plaintiffs claim, that the judgment should be reversed and a new trial ordered.

DEEDS — RESERVATIONS. — Although a reservation in a deed repugnant to the estate previously described in the *habendum* clause is void: *Pyncheon v. Stearns*, 11 Met. 312; 45 Am. Dec. 210; a reservation should never be regarded as repugnant, where the grantee, if it be permitted to be effectual, may acquire a valuable interest in the thing granted: *Gay v. Walker*, 36 Me. 54; 58 Am. Dec. 734. The intent of the parties must control in the construction of reservations in deeds, and such intent is to be gathered from the nature of the subject-matter and the language used: *Cooney v. Hayes*, 40 Vt. 478; 94 Am. Dec. 425; and whenever the intention of the parties clearly appears from the face of a deed, effect must be given thereto, however unusual the form of the deed, unless the repugnancy in its clauses is such as to render the deed wholly void: *Cravens v. White*, 73 Tex. 577; 15 Am. St. Rep. 803, and note.

CITY OF PORT HURON v. JENKINSON.

[77 MICHIGAN, 414.]

ENACTMENT OF CITY ORDINANCE CONDITION PRECEDENT TO LIABILITY FOR FAILURE TO CONSTRUCT SIDEWALK WHEN. — Where, by the provisions of a city charter, before a person owning land in the city can be required to build a sidewalk in front of or adjacent to his land, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such an ordinance is a condition precedent to any liability for failing to make such sidewalk.

PERSON CANNOT BE PUNISHED FOR FAILING TO DO ACT IMPOSSIBLE FOR HIM TO PERFORM. — No legislative or municipal body has the power to impose the duty of performing an act upon any person which, from his poverty, it is impossible for him to perform, and then make his non-performance of such duty a crime punishable by fine and imprisonment. And therefore a city ordinance which requires all persons owning or occupying any real estate in the city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposes a fine or imprisonment for a failure to do so, and a charter provision authorizing such an ordinance, are both unconstitutional and void, because, under such ordinance, a tenant of property, though himself supported by charity, might become guilty of a crime in omitting to construct a sidewalk.

PROSECUTION for violation of a city ordinance. The opinion states the case.

P. H. Phillips, for the appellant.

Stevens and Merriam, for the defendant.

SHERWOOD, C. J. This action was brought by the city of Port Huron to recover of the defendant a penalty claimed to have been incurred by him for the violation of an ordinance of said city requiring him to keep and maintain a good and sufficient sidewalk along the street in front of the premises owned by him, and which it was his duty to construct and maintain. The ordinance of the city for the violation of which complaint was made reads as follows: —

"Sec. 1. All persons owning or occupying or having any real estate within the city of Port Huron shall keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate. And any such person failing or refusing to build or repair any such sidewalk in front of or adjacent to real estate owned or occupied by him, or in which he is interested, for ten days after notice to him to build or repair any such sidewalk by the superintendent of public works, shall be deemed a violator of this ordinance."

Section 14 provides that "violators of this ordinance shall, on conviction thereof, be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed three months."

The ordinances established by the mayor and common council of said city further provide that "whenever the accused shall be tried for the violation or non-observance of any ordinance, or any provision of the city charter, of the city of Port Huron, and found guilty, either by the court or by a jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall render judgment thereupon, and inflict such punishment, either by fine, penalty, forfeiture, or imprisonment, together with such costs of prosecution, as may be authorized by law and the court may order. But such punishment shall in no case exceed the limit fixed by law for the offense charged; and in rendering such judgment, and inflicting such punishment, the court may award against such offender a conditional sentence, and order him to pay a fine, with or without costs of prosecution, and in default thereof, to suffer such imprisonment as is provided by law and awarded by the court in all cases where the offender shall be convicted of an offense punishable, at the discretion

of the court, either by fine or imprisonment, or both; provided, that when any person is convicted of being a disorderly person, under any provision of the charter or ordinances of the city of Port Huron, the court may, in its discretion, require of the offender a recognizance, with sufficient sureties, for good behavior for a term of not less than sixty days nor more than one year thereafter; and when such security for good behavior is required to be given, the court or magistrate may require and further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged. But such imprisonment shall not exceed ninety days."

The power of the council of the city of Port Huron to pass the ordinance in question is claimed under section 1, chapter 18, of the city charter, and is as follows: "It will be the duty of each and every person owning, occupying, or having any interest in any real estate within the city to construct, keep, and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate; and upon failure so to do, such person, after due notice, shall be liable to prosecution according to such ordinances as the common council of said city may adopt": Local Acts 1885, p. 538.

It is claimed the testimony showed a violation of the ordinance; and after the same was given, the defendant, by his counsel, moved the court (the justice before whom he had been brought by warrant) that the complaint and warrant be quashed, and the defendant be discharged, for the following reasons:—

1. That the charter of the city did not authorize criminal punishment or criminal proceedings in the case for the offense charged, nor empower said city to punish criminally the person so refusing or neglecting to build a sidewalk.

2. If the charter was intended to confer such authority, the provision purporting to confer the same is unconstitutional.

3. The ordinances referred to, providing criminal punishment for the offense charged against the defendant, and under which the proceedings were had against him wherein he was convicted, were illegal and void.

The justice overruled the motion, found the defendant guilty, and gave judgment that he should pay a fine of twenty-five dollars, and costs of prosecution, and in default of such payment, be confined in the county jail for thirty days.

This conviction was removed to the circuit court for the county of St. Clair, by *certiorari*, where the case was heard before Judge Canfield, who reversed the judgment of the justice, and gave judgment against the city for the costs of the suit. The city now seeks a review of the questions raised.

But two questions were argued in this court by counsel for the city. The first relates to the constitutionality of the act under which the ordinance was passed; and second, Does the section of the act referred to authorize the adoption of the ordinance under which the prosecution was had?

The ordinance is clearly within the provisions of the statute; but that is of no consequence in this case, as will hereafter appear.

In the affidavit upon which the writ of *certiorari* was obtained, the defendant made the following allegations of error, and which were presented for the consideration of the circuit court:—

“1. The warrant issued in said cause did not authorize the apprehension or arrest of the deponent, for the reasons,—*a.* That it was not directed to anybody,—to any officer or person authorized to make arrests; *b.* That no criminal action was alleged therein.

“2. That the provision of the ordinance referred to authorizing criminal prosecutions to be instituted against persons who fail to build or repair sidewalks in the city of Port Huron is unconstitutional, illegal, and void.

“3. The judgment of the justice aforesaid was void, as the provisions of the charter aforesaid do not authorize an alternative judgment.”

By section 2, chapter 18, of the city charter, it is provided that “the common council shall have power to prescribe, by resolution or ordinance, the grade, width, and character of all sidewalks within said city, and the materials of which and the time within which the same shall be constructed or repaired; and may provide for the punishment, by fine or imprisonment, or both, of any and every person who fails, neglects, or refuses to comply with the provisions and requirements of such resolution or ordinance.”

It will be seen, from an examination of the two sections of the statute herein given, that before a person owning land in the city can be required to build a sidewalk along the street upon which it abuts, the council must have passed an ordinance prescribing the kind of walk to be built, its dimensions,

and the material to be used therein, as well as the time within which it must be made. In the case of that required of this defendant, the record does not show that this was ever done. The complaint and warrant are both defective in this respect, and the court was without jurisdiction in the case; and the magistrate should have yielded to the motion to dismiss the proceedings, when it was made by counsel for the defendant.

This defect would be sufficient to dispose of the case if no other infirmity appeared; but a more serious difficulty is encountered upon an examination of these two sections of the statute, and the provisions of the by-law enacted by the council thereunder. Neither of them is of any validity whatever.

No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and then make his non-performance of such a duty a crime for which he may be punished by both fine and imprisonment. It needs no argument to convince any court or citizen, where law prevails, that this cannot be done; and yet such is the effect of the provisions of the statute and by-law under consideration. It will readily be seen that a tenant occupying a house and lot in the city of Port Huron, and so poor and indigent as to receive support from his charitable neighbors, if required by the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, and fails to comply with such request, such omission becomes criminal, and upon conviction of the offense, he may be fined and imprisoned. It is hardly necessary to say these two sections of the statute are unconstitutional and void, and that the provisions are of no force or effect. They are obnoxious to our constitution and laws; and the two sections of the statute are a disgrace to the legislation of the state.

The judgment of the circuit court will be affirmed, with costs to be paid to the defendant by the city.

THE PRINCIPAL CASE is, so far as we can ascertain, the first to announce the invalidity of laws imposing penalties and punishing as crimes the non-performance of acts which the persons offending may not have the financial ability to perform. In order that streets may be promptly improved or repaired, or kept in a safe and proper condition for travelers, many municipalities have declared the omission of certain acts, such as constructing or repairing sidewalks, removing ice and snow, and the like, to be punishable as crimes, and have thus denounced as criminals persons who may be guilty of nothing worse than want of money, and the consequent inability to do acts not capable of being done without its aid. That property may be made

chargeable with the expense of putting and keeping the adjacent streets in proper condition for travel and business may be readily conceded, without admitting the right to coerce its owners and occupants, by fine and imprisonment. The value of the property may be insufficient to repay the expenditure exacted, or the owner may be and the occupant often is financially unable to respond to the exaction. While ordinances similar in character to that condemned in the principal case have been sometimes overthrown and more frequently upheld, we know of no other case considering the circumstance that those guilty of omissions may be so because of inability to comply, and that to punish them is but to punish their poverty, which, conceding it to be criminal, rarely fails to be in itself an adequate punishment. We regret that the court did not give this part of the case, if not a more adequate consideration, at least an opinion exhibiting in detail the principles and authorities determining its judgment.

MUNICIPAL ORDINANCE requiring the occupants and owners of premises to remove snow from adjacent sidewalks is invalid: *Chicago v. O'Brien*, 111 Ill. 522; 53 Am. Rep. 640. Streets and sidewalks of a city are public highways, which it is the common duty of the citizens of such city to maintain. The maintenance and construction of such streets cannot constitutionally be imposed upon any one citizen or class of citizens: *City of Lexington v. McQuillan*, 9 Dana, 513; 35 Am. Dec. 159. Perhaps the weight of authority conflicts with the decisions cited above, and maintains the validity of ordinances similar to those there pronounced invalid: *Village of Carthage v. Frederick*, 122 N. Y. 269; 19 Am. St. Rep.

COPELAND v. DWELLING-HOUSE INSURANCE COMPANY.

[77 MICHIGAN, 554.]

INSURANCE COMPANY ESTOPPED FROM CLAIMING FORFEITURE FOR ACT OF INSURED PERMITTED BY ITS AGENT WHEN. — Where an agent of an insurance company, having authority to make and deliver policies of insurance, without referring the application to the company prior to the making and delivery of the policy, agrees with an applicant that she may encumber the property insured in a given amount, and that he will indorse the agreement upon the application, the company is estopped from claiming a forfeiture by reason of the insured having encumbered the property in the amount named, there being nothing in the policy limiting the power of the agent to make such an agreement.

ASSUMPSIT. The opinion states the case.

Millis and White, for the appellant.

Geer and Williams, for the plaintiffs.

LONG, J. This action is brought to recover upon a policy of insurance issued by defendant company to plaintiffs on April 15, 1886, for one thousand dollars; three hundred dollars of the insurance being upon the barn and sheds, one hundred dollars upon the hog-pen, granary, and hen-house, four

hundred dollars on hay, grain, farming implements, wagons, carriages, etc., and the balance of two hundred dollars on live-stock. A premium of \$9.50 was paid for the policy to William Murch, defendant's agent at North Branch, Lapeer County.

On the morning of November 17, 1886, the barns, sheds, and a large quantity of hay, farming implements, etc., were consumed by fire. Proofs of loss were thereafter made in due form, and payment of the loss demanded. The defendant company refused payment, and, at the time of joining issue in the suit brought on the policy, gave notice with its plea:—

"1. That the policy mentioned in said declaration was issued by said defendant on the faith of an application therefor, partly in writing, and partly in print, signed 'Mary Copeland, per William Copeland,' in which application it was represented and warranted that the property insured, and for the burning of a portion of which property recovery is sought in this cause, was unencumbered, while in truth and fact the barn mentioned in said declaration and in said policy was encumbered by a certain mortgage, which said mortgage is as follows, to wit, one certain mortgage given by Mary A. Copeland to one John M. Wattles, bearing date September 15, 1885, for the sum of three hundred dollars, which mortgage remained unpaid at the time of the fire mentioned in said declaration;

"2. That said plaintiff Mary A. Copeland, after the issuing of said policy, and before the fire mentioned in said declaration, did, without the consent of said defendant, further encumber said barn by a mortgage, which last-aforesaid mortgage is described as follows, to wit, one certain mortgage given by Mary A. Copeland to one John M. Wattles, bearing date September 15, 1886, for the sum of one hundred dollars, which last-aforesaid mortgage remained unpaid at the time of the fire mentioned in said declaration;

"3. That the burning of the property for the recovery of which this action is brought was procured by the said plaintiff William Copeland."

The only question presented by counsel for the defendant company arises under the second paragraph of the notice attached to the plea. There is no controversy but that Mary A. Copeland, one of the plaintiffs, and the one in whom the title to the real estate was vested upon which the barn and

other property destroyed were situated, on September 15, 1886, and after the issue of the policy by defendant's agent, placed a mortgage upon the realty for the sum of one hundred dollars, running to John M. Wattles, mortgagee, and that said mortgage remained unpaid at the time of the fire. It is this act of which the defendant complains, and which, it is claimed, violates the policy.

On the trial of the cause, plaintiffs claimed that at the time of the making of the application (which was in writing) for the policy, and prior to the time the policy issued, they informed Mr. Murch, the defendant's agent, that they expected to put the mortgage of one hundred dollars upon the property in a short time, and that he assented thereto. This Mr. Murch denies. The question was submitted to the jury by the court in his general charge. The court directed, if they found that Murch made such an agreement with plaintiff, the company would be bound by it; and the fact that plaintiffs, subsequent to the time of the issuing of the policy, placed the mortgage upon the property without further notice to the company, would not invalidate the policy.

It appears that Mr. Murch, the agent of the company, had authority to make and deliver policies of insurance without referring the application to the company prior to the making and delivery of the policy. Before the policy was made, he inspected the property, and concedes that the farm upon which it was situated was worth two thousand dollars.

The plaintiffs, it appears, were insured in the Lapeer County Mutual Insurance Company, and the policy therein was in force at the time the application was made in the defendant company. Murch, however, solicited the plaintiffs to change their insurance, and first took the application of the husband, who signed Mary A. Copeland's name thereto, "per William Copeland." The title to the farm was in Mrs. Copeland's name, but the title to the personal property, or some portion of it, was in Mr. Copeland. Murch was fully informed of these matters, and advised the issuing of the policy to them both. A few days after the first application was made by William Copeland, Murch, the agent, called at the house, and there filled out a new application. Mrs. Copeland says: "I took the application, and looked it over, until it came to the passage where it asked if there was any liens or encumbrances against the property, and the answer was 'No.' I pushed the paper aside. My husband came to me; he says, 'What is wrong

with the paper?' I pointed to that passage. He turned to Mr. Murch, and says: 'Mr. Murch, explain it to my wife as you did to me,' and he read the passage to him. 'Oh,' he says, 'that means that there is n't encumbrance enough to make the risk hazardous.' He says, 'It don't matter if there is an encumbrance, as long as there is not enough to make the risk hazardous.' I says, 'I object to signing under those circumstances'; and he said he would fix that all right, and I supposed he did. I told him then that John M. Wattles held a mortgage of three hundred dollars, and my husband spoke up and said that we might want to get some further money,—one or two hundred dollars,—and he said it would be all right, or that he would fix it all right. . . . Before this policy was delivered to me I fully advised him in relation to the mortgage that was to be put upon it, and what I intended to do with it, and we relied upon and accepted that policy, supposing that he would make that indorsement upon the application that we signed. I accepted it upon those terms."

This testimony is fully denied by Mr. Murch, and he claims that there was no such arrangement or understanding; that nothing was said of any encumbrance being on the property, or that any was to be put on. Mrs. Copeland, however, is fully supported by her husband and by Mr. Daniel Draper, who was present when Murch, the agent, was looking the property over, and who says that William Copeland then advised him of the encumbrance, and their desire to put on another mortgage, when Murch said it would be all right.

It is a somewhat curious fact that on the trial the last application was not produced, nor in any manner accounted for. The application signed by William Copeland for his wife was the one produced, and which Murch himself testifies Mary A. Copeland never signed. It was the second application which Mary A. Copeland read over, and which she and her husband say Murch agreed to "fix all right," and upon which Mrs. Copeland says Murch agreed to make the indorsement. Whether it was fixed all right, or whether Murch made such an indorsement upon it, noting the encumbrance then existing, and an agreement for the placing of an additional mortgage of from one hundred to two hundred dollars upon it, is not shown by the application introduced. Apparently this last application was the one upon which the policy issued, and was the only one defendant was entitled to have in evidence, even under its own testimony. The court, however, admitted in

evidence the first application; but inasmuch as the plaintiffs are not here complaining, we need not discuss this point in the case any further than it may be treated as a circumstance tending strongly to show the correctness of the plaintiffs' claim that such an arrangement was made, and that Murch had full notice of the encumbrance then existing, and agreed to fix the application so that the plaintiffs might place an additional encumbrance thereon of from one hundred to two hundred dollars, and that he did not regard this as increasing the hazard.

Under the finding of the jury we must consider the case upon the theory that such an arrangement was made, and that Murch agreed not only to fix the application so that it would show the encumbrance then existing, but to write an agreement on the application that would authorize the plaintiffs to put on from one hundred to two hundred dollars additional. From the fact that this application was withheld on the trial, and the first one produced, a strong inference arises that, had it been produced and exhibited, it would have shown the indorsements claimed by plaintiffs.

Counsel for defendant contend that the court was in error in submitting the case to the jury upon plaintiffs' theory; that the case must be governed by the rule laid down in many cases, that parol agreements or representations, made at the time, or prior to the time, a contract is reduced to writing, cannot be received to add to, vary, or contradict the terms of a written instrument. This is the well-settled rule, but counsel are in error in attempting to apply it to the present case. Even if the rule could be so applied, we must treat the contract as consisting of the application actually made, and which was not produced on the trial, and the policy itself. By the terms of the policy this application was made a part of the contract. The policy provides as follows: "By the acceptance of this policy, the assured covenants that the application herefor shall be and form a part hereof."

The policy provides further, however, that the application shall be treated as a warranty by the assured, and the company shall not be bound by any act or statement made to or by an agent unless inserted in the contract. There is nothing in the policy limiting the power of the agent to make just such an agreement as claimed by the plaintiffs. It only provides, "If there is or shall be other prior, concurrent, or subsequent insurance, whether valid or not, on said property, or any part thereof, without the company's consent herein; or if

said buildings, or either of them, now are or shall become vacant or unoccupied; or if the hazard shall be increased in any way; or if the property, or any part thereof, shall be sold, conveyed, encumbered by mortgage or otherwise, or any change take place in the title, use, occupation, or possession thereof whatever; or if foreclosure proceedings shall be commenced; or if the interest of the assured in said property, or any part thereof, now is or shall become any other or less than a perfect, legal, and equitable title and ownership, free from all liens whatever, except as stated in writing hereon; or if the buildings, or either of them, stand on leased ground, or land of which the assured has not a perfect title; or if this policy shall be assigned without written consent herein,—then and in every such case this policy shall be absolutely void.”

If there was an encumbrance on the property, and the agent had notice of it, and agreed to note the fact on the application, and plaintiffs rested under the belief that it was so noted, there can be no doubt that the company would be estopped from setting up the fact to defeat a recovery upon the policy, even though not actually indorsed thereon, as such notice would be notice to the company.

In *Temmink v. Metropolitan L. Ins. Co.*, 72 Mich. 388, it was held by this court that where a life insurance agent assumes the responsibility of filling out a blank application, and the applicant, presuming that he had acted honestly, signs it without any knowledge of its contents, a recovery may be had upon the policy, though certain representations may be materially false. See also *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 7 Am. St. Rep. 557.

Counsel for defendant claim that however this may be in reference to encumbrance already existing on the property, yet if any such arrangement was made, as plaintiffs claimed it was,—one contemplated in the future,—the stipulation or understanding, if it amounted to anything, was an executory contract, intended to form a part of the contract of insurance, and that this being so, the doctrine cannot be admitted that any part can rest in parol.

The agreement, as claimed by plaintiffs, amounted to more than this. They claimed the right to encumber the property further; and the defendant agreed, through its agent, that they might do so to the amount claimed, and that this should form a part of the writing, and should be indorsed on the

application. If it had been so indorsed, no one would claim that the policy would be rendered void when the mortgage was so placed upon it, as the policy and application together formed the contract. The plaintiffs relied upon defendant's agent to write this agreement in the contract, and he agreed to so write it. The agent failing to do this, it is as much a fraud upon the plaintiffs as though he had written a clause in the application, without the knowledge of the plaintiffs, making the policy void if such additional encumbrance was placed upon the property. The plaintiffs had a right to rely upon the agreement of the agent to so write the application, and when they took the policy they had a right to assume that the company waived any conditions in the policy inconsistent with their right to further encumber. Parol evidence was certainly competent to show such an agreement, and it is not a violation of the rule that verbal testimony is not admissible to vary a written contract.

This whole controversy arises out of the forfeiture clause in the policy. The act complained of, which defendant claims forfeited plaintiffs' right of recovery, was one which the company or its agent could have given plaintiffs the right to perform, and if assented to by the company, would not have worked a forfeiture. The company is now estopped from claiming any forfeiture by reason of this encumbrance. Through their agent they assented to it, and no further notice was required. This principle is sustained in *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Kausal v. Minnesota F. M. F. Ins. Ass'n*, 31 Minn. 17; 47 Am. Rep. 776.

There was no error in the charge as given. If any error was committed by the trial court, it was in permitting the defendant to introduce in evidence an application which it was not pretended one of the plaintiffs ever signed or approved, and upon which it is not claimed the policy issued, and consequently formed no part of the contract. Of this, however, the defendant is not complaining.

The judgment of the court below must be affirmed, with costs.

FIRE INSURANCE — ESTOPPED BY ACTS OF AGENT. — An insurance company may be estopped from enforcing a forfeiture by the acts and conduct of its agent: *Little v. Phoenix Ins. Co.*, 123 Mass. 380; 25 Am. Rep. 96; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; 32 Am. Rep. 330; *Renier v. Dwelling-house Ins. Co.*, 74 Wis. 89. Fraud or mistake upon the part of an insurance agent, within the scope of his authority, does not authorize the company to avoid a policy: *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 25 Am. St. Rep. 696.

HESS v. CULVER.

[77 MICHIGAN, 598.]

PRESUMPTION THAT MAN KNOWS THE LAW NOT CONCLUSIVE. — While a man is, for public reasons, held responsible for his conduct, although ignorant of the law, there is no conclusive presumption that he actually knows the law. Where a man is defrauded by the misrepresentation of some one who assumes knowledge, and is, under the circumstances, actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain.

PARTIES NOT IN PARI DELICTO WHEN. — The law rigidly forbids relief where the parties are in equal guilt. But while it does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to an arrangement by which he is defrauded by the misrepresentation of another is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. And even actual knowledge of legal rights and liabilities is not always conclusive against relief.

LAW WILL NOT REFUSE REDRESS TO LOSER WHO WAS DEFRAUDED into paying money without understanding fully that the dealing was improper.

LAW REQUIRING FALSE REPRESENTATIONS TO BE IN WRITING NOT APPLICABLE WHEN. — The Michigan statute requiring false representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, is intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances, but cannot apply to conspiracies or frauds where the representation is made to enable the party making it to profit by it.

TESTIMONY SUFFICIENT TO SEND CAUSE TO JURY WHEN. — Testimony that the defendant, by false and fraudulent pretenses, and without any consideration at all, got from the plaintiff notes which the latter had to pay, and divided the plunder between himself and his confederates, if true, establishes a complete cause of action, and the case should go to the jury.

CASE. The opinion states the facts.

T. A. E. and J. C. Weadock, for the appellant.

Simonson, Gillett, and Courtright, for the defendant.

CAMPBELL, J. Plaintiff, who is a farmer near Bay City, was induced by the representations of defendant to give his notes, payable to bearer, for \$375 and interest, and deliver them to defendant, who got them discounted by a *bona fide* holder, and plaintiff had to pay them. This suit was brought to recover against Culver for having obtained the notes by fraud, and without consideration. The only consideration agreed on was the purchase of Bohemian oats, at fifteen dollars a bushel, and the bond of what purported to be, but was

not, a Michigan corporation, agreeing to sell for plaintiff fifty bushels at the same price, on a commission of one third. No delivery was made to plaintiff of any oats, and the bond was fictitious, if not in law a forgery, there being no such corporation as purported to issue it.

The declaration set forth and the testimony showed that plaintiff was led by defendant's persistent arts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of the mythical corporation, to give his notes, for which he received no consideration whatever. The court below, however, held that he had no cause of action, and directed a verdict for the defendant. This could only be upon one of two theories relied on, namely: 1. That the transaction was illegal, and the parties *in pari delicto*; and 2. That defendant was not liable for false representations not in writing.

So far as the first point is concerned, it seem to be based on a false theory. If plaintiff were seeking to enforce such a bond as was palmed off on him, his ignorance that it was illegal in its purposes would not perhaps absolve him from the consequences of trusting to a void contract. But it has been held by this court in repeated instances that while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law: *Black v. Ward*, 27 Mich. 191; 15 Am. Rep. 162; *Stanton v. Hart*, 27 Mich. 539.

Where a man is defrauded, as often happens, by the misrepresentation of some one who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. The only rigid rule forbidding relief is where the parties are in equal guilt. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. Even actual knowledge of legal rights and liabilities is not always conclusive against relief: *Wartemberg v. Spiegel*, 31 Mich. 400; *Barnes v. Brown*, 32 Mich. 146. Our statutes make this clear distinction in regard to gaming contracts.

The winner cannot enforce his winnings against the loser, but the loser may recover back money actually paid: Howell's Statutes, sec. 2023. Where this may be done in case of open gambling, where the loser knew all about it, the law is not so squeamish as to refuse redress to a loser who was defrauded into paying money without understanding fully that the dealing was improper. One of the elements in this fraud was that defendant accomplished it by representing that the alleged company was a corporation authorized to do the acts referred to by the laws of this state, and therefore having full legal sanction and recognition in its doings, so that plaintiff had no reason to suppose the dealings would be subject to any lawful objection.

The other point suggested has no support in the statute. The legal provision concerning the necessity of representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it. Moreover, in the present case, the false showing was not concerning the responsibility of an existing person whose personality was known, but concerning an alleged corporation that was no corporation, and whose pretense of legal existence was itself a fraud. *Bush v. Sprague*, 51 Mich. 41, is in point on more than one question in this case.

Here, if the testimony is true, defendant, by false and fraudulent pretenses, and without any consideration at all, got from plaintiff notes which he had to pay, and divided the plunder between himself and his confederates. Upon the facts, if believed, the cause of action was complete. The case should have gone to the jury.

The judgment must be reversed, with costs, and a new trial granted.

THE MAXIM, *Ignorantia juris non excusat*, is the subject of a note to *Black v. Ward*, 15 Am. Rep. 171-184, wherein are collected the leading cases, both English and American, bearing upon the subject.

IN PARI DELICTO.—Where all parties concerned in an alleged illegal transaction have participated in that illegality, though it may be available as a defense, it by no means follows that it can be made a ground for affirmative relief, which is dependent upon the discretion of the court, although there

may be exceptions where the law offended has been made to prevent oppression, and the oppressed party is seeking relief, or where public policy will be advanced by allowing relief: *Goshen Township v. Shoemaker*, 12 Ohio St. 624; 80 Am. Dec. 386. The law takes note of an ignorant and credulous man, and converts his ignorance and credulity into innocence, so as to protect him against one who has defrauded him; *Pearl v. Walker*, 80 Mich. 317. But in *Jones v. Hanna*, 81 Cal. 507, it is said that "it is a universal rule that courts will not aid parties in the enforcement of contracts interdicted by law."

CHAFFEE v. TELEPHONE AND TELEGRAPH CONSTRUCTION COMPANY.

[77 MICHIGAN, 625.]

ESTOPPEL FROM ACQUIESCENCE IN MAINTENANCE OF TELEGRAPH POLES AND WIRES. — A man cannot erect a building on his lot by the side of telegraph and telephone poles and wires maintained in a private alley appurtenant to his lot without any protest or demurrer whatsoever against their standing there, when they are on his own land, and go on for years without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up against the corporation maintaining the poles the loss occasioned by such fire.

CASE. The opinion states the facts.

Otto Kirchner, for the appellant.

William H. Wells and Ashley Pond, for the defendant.

MORSE, J. Plaintiff was the owner of lot 73 in section 2 of the governor and judges' plan in the city of Detroit, and of a valuable brick building thereon that yielded a monthly rent of \$250. It was situated on the south side of Larned Street West, in the block bounded by Larned Street and Jefferson Avenue on the north and south, and by Griswold and Shelby streets on the east and west, respectively.

The block was intersected by an alley twenty feet wide, running between Jefferson Avenue and Larned Street, from Griswold Street westerly to Shelby Street. The defendant put up and maintained sixty wires, stretched on cross-arms, each six feet long, attached to poles planted in the ground (eight to each pole) through said alley, in the rear of plaintiff's building. There were also twelve telegraph wires stretched through said alley by another company.

On March 2, 1888, a fire broke out in the building, and everything burned except the walls. Some of the brick walls

were not damaged so as to require to be taken down, but a part of them were. It is claimed that these wires prevented the fire department from extinguishing the fire. Mr. Tryon, the secretary of the fire department, testified, as did Mr. Elliott, the assistant chief engineer, that on account of these wires it was impossible for the firemen to raise the ladders, which were on trucks. Mr. Tryon, some time before the fire, notified Mr. Phillips, the manager of the defendant company, that these wires in the alley would prevent the fire department from raising its ladders in the event of a fire. Mr. Phillips replied that this was undoubtedly correct, but that the defendant company were preparing to get their wires underground, and that they would strip that alley as soon as possible, — probably the first thing they did. When the firemen first reached the premises the fire was in the third story. Evidence was given on behalf of the plaintiff tending to show that if it had not been for these wires the first and second stories of the building could have been saved intact, except the damage from the water thrown on the fire.

The plaintiff sues in trespass on the case, claiming damages, and contends, — 1. That the alley was a private way, appurtenant to his lot and building; 2. That the erection of the wires by defendant in the alley was a trespass, and their maintenance a nuisance every continuance of which was a new nuisance; 3. That, in contemplation of law, defendant, by its wires, was at the fire, and by force and arms prevented its extinction, and in so doing, was the direct and immediate cause of the destruction of plaintiff's building.

The defendant claims, — 1. That the defendant was not unlawfully maintaining the wires in the alley; 2. The act complained of was not the proximate cause of the loss; 3. The damages sought to be shown by the plaintiff's testimony are vague and speculative.

The first contention of the defendant is based upon the long acquiescence of the plaintiff in the maintenance of the wires in the alley.

The circuit judge before whom the case was tried, Hon. Cornelius J. Reilly of the Wayne circuit court, at the close of the testimony directed a verdict for the defendant.

In the view that I take of the case, it is not necessary to discuss much of the evidence, or any point in the case save the first plea of the defendant. The evidence is uncontradicted that the building was erected five years before the trial.

of the suit. Before the erection of the burned building, the lot was occupied by a dwelling-house which had been there a great many years. The plaintiff testifies that the wires were placed there "a good while ago, and were there when the brick building which was burned was erected."

He knew the poles were there, and what the wires were used for. "I asked no questions about it. From the time I first knew the wires were there, I understood what they were for."

He never asked the defendant to remove them, nor protested against their maintenance in the alley, nor in any way manifested any dissent to the action of the defendant in keeping and using them there. He testifies that one of his tenants used a telephone in his building, and says: "I never objected, or found fault with the defendant company for maintaining their wires in the alley."

I can see no legal or equitable reason why the plaintiff, tacitly assenting to the maintenance of the wires in this alley, by allowing his tenant to use a telephone connected therewith, and by permitting them to remain there without the least objection, should be allowed, after this fire, to place the damage, or any part of it, upon the defendant, nor can I find any law to sustain his action. It is contended by the counsel for plaintiff that the maintenance of the wires in the alley was a nuisance, and a continuing one from day to day, each continuance being a new nuisance; that the defendant was liable to the plaintiff in an action at law for the obstruction of the alley every day up to and including the day of the fire; and that therefore the acquiescence of the plaintiff for one or more days cannot be used to infer an implied license for its continuance another day. The following cases are cited to support this contention: *Reid v. City of Atlanta*, 73 Ga. 523; *Gray v. Boston Gas Light Co.*, 114 Mass. 149; *Philadelphia etc. R. R. Co. v. State*, 20 Md. 157; *Pettis v. Johnson*, 58 Ind. 139.

These cases do not meet the question presented here. Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can never be gained by prescription. But I can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires without any protest or demur whatsoever against their standing there, when they are on his own land,

and go on for years without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it. I do not doubt the right of Mr. Chaffee to have moved at any moment to abate this nuisance; but while he acquiesced in it, and virtually was using it, or deriving some benefit from it, through a tenant in his building, he cannot be permitted to recover damages because of its maintenance upon his premises.

If there can be any assent which is not shown by express words, the plaintiff assented to the continuance of these poles upon his premises, and such assent was not a question for the jury. It was shown without dispute, by his own testimony. There was clearly, to my mind, an implied assent that the poles might remain there, and no hint anywhere, not even in his testimony on the trial, that he ever considered them a nuisance until they were demonstrated to be so by the fire. Until something was done by Chaffee to notify the defendant that he found some fault with the maintenance of these poles in the alley, he could not recover damages for their being there.

The judgment was right, and must be affirmed.

CAMPBELL, J. (dissenting). Whatever may be its effect as a circumstance on the question of damages, I think there can be no doubt of the right of any land-owner to sue for some damages for any encroachment on his property rights. Delay in complaining may sometimes cut off a right to sue in equity, but nothing short of statutory limitations can bar a suit at law. And where a wrongful entry or intrusion is made without license or permission, no license can be legally determined from inaction.

There is some difficulty in ascertaining the precise effect of the wires in connection with the fire. But such difficulty is no defense to an action, and a wrong-doer, and not the injured party, must bear this difficulty. Whether the danger of interference with putting out fires is a natural one, to which damage may be attached, is at least a question for the jury. That serious damage and fatal casualties have arisen from the placing of numerous wires near high buildings is a matter of

common knowledge, and there can be no doubt it is a wrong, unless consented to. It is not in the power of a city to license any one to damage or encroach on the property of individuals, and no justification can be based on it.

I do not think it can be held, as matter of law, that Mr. Chaffee is estopped from complaining of the action of the defendant, or from recovering some damages. Nor do I think we can prevent a jury from considering the amount of damages, under proper instructions as to the law, the facts not being subject to judicial determination. I think there should be a new trial.

ESTOPPEL — NUISANCE. — Estoppel to object to the maintenance of a nuisance by reason of acquiescence or laches, see note to *City of Logansport v. Uh*, 50 Am. Rep. 117-119.

ESTOPPEL. — One may be estopped by silence or a failure to assert one's rights: Note to *Cook v. Walling*, 10 Am. St. Rep. 22, 23.

RIPLEY v. CASE.

[78 MICHIGAN, 126.]

ASSUMPSIT. — MONEY PAID WITHOUT CONSIDERATION may be recovered in *assumpsit* under a declaration on the common counts for money had and received.

SALES — FRAUD BY VENDOR. — WHERE A BOND IS FAIRLY REPRESENTED by the vendor as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and is purchased honestly on such recommendation, it is a fraud to so transfer it, and upon discovery of its worthlessness, the purchaser may maintain an action to recover the money paid for it, although he did not read it carefully before purchasing.

Barbour and Rexford, for the appellant.

Alfred Russell, for the respondent.

CAMPBELL, J. Plaintiff sued defendant for money had and received. The bill of particulars based the demand on a fraudulent sale of a worthless bond of the Michigan Air Line Railroad Company, upon the representation that it was a bond of the Michigan Central Railroad Company. The court below, without assigning any reason, took the case from the jury. The only question is, whether the plaintiff showed anything to go to the jury.

As this is not an action for damages for fraud, but is to recover the whole consideration, as obtained from plaintiff, for an absolutely worthless bond, we see no reason why the

declaration is not good, if any such case was made as is relied on. The plaintiff's showing, for this purpose, must govern, whether contradicted or not. That was to this effect: —

November 15, 1887, defendant wrote, requesting one J. W. Renwick, of New York, to take a bond of one thousand dollars left with him, and cut off and return the past-due coupons. He was then to leave it with A. S. Flandrau & Co., who had a small debt against defendant, in order that they might sell it. Some reasons were given why defendant wanted to sell it. He stated he had nine more, and thought they could be sold, and asked Renwick simply to say the bond had been left with him for safe-keeping. Renwick had held it since December, 1885. The bond belonged to a series issued by the Michigan Air Line company, confined to a short section of thirty-five miles, between Ridgeway and the Detroit and Milwaukee railroad. It was issued in 1870, and the mortgage had been foreclosed, and the bonds had no value or legal efficacy. Flandrau & Co. was a firm name of Keyes and Wilson. The bond was handed to Keyes and Wilson. Defendant wrote to them on the day he wrote Renwick, telling them he had requested Renwick to hand them "a M. C. R. R. bond for one thousand dollars," and saying, "if you can sell the same, please do so." This abbreviation, "M. C. R. R.," is the recognized name of the Michigan Central railroad. That road had become liable on a series of bonds known as "Air Line" bonds, which were at a premium in the market, and the bond in question bore a general resemblance to the Michigan Central bonds. The absence of past-due coupons was some indication that it was not in default. In the letter to Flandrau & Co., defendant made the same statement as to Renwick, that he had been buying a house and lot, and was a little hard up. Keyes and Wilson (or Flandrau & Co.) put the bond in the hands of a broker, showing him defendant's letter. There was a few days' delay in finding a purchaser, and on November 22d, Keyes and Wilson wrote to defendant that the bond did not seem to be much known in New York, but that they had found a market for it, and could only get three and one half per cent premium, because it had but two years to run. Defendant telegraphed to close the bargain, and send balance. It was sold to plaintiff, and proceeds accounted for. In answer to defendant's inquiry if more could be sold, he was answered in the negative, and advised to consult his banker,

in Detroit. Plaintiff bought it on the representation of the broker that it was a Michigan Central Air Line bond. The testimony was legally sufficient to show that the broker represented defendant, and was informed that the bond was a Michigan Central security. It was a long instrument, which, if read through carefully, would have shown what it was issued for, and that it was on another road.

After the fraud was discovered, various efforts were made by Keyes and Wilson, and by plaintiff, to make defendant refund, but he would not do so. Defendant introduced some testimony undertaking to explain how he got the bond, and how he got some others. We need not comment on it, as it might not have impressed the jury as he desired, and it was not for the court to accept, as we can hardly assume it was given any particular form in the decision, which rested either on the form of the pleading or on the absence of actionable fraud.

Unless plaintiff is barred from recovery because he did not read the bond, his testimony makes out a clear case. It is not customary, in such transactions, for dealers or purchasers to spell through every security offered for sale. If a bond is represented as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and if it is purchased honestly on such a recommendation, it is a fraud to so transfer it. There are many broken or worthless bills circulated which no one ever supposed to be any less fraudulent because genuine. Very few counterfeits would bear close inspection. They are circulated on their general good looks, and it is in that way the fraud is done. If defendant actually cheated plaintiff out of good money for a worthless bond, under circumstances which deceived, and were naturally calculated or intended to deceive, there is no reason why he should not be compelled to refund. We think the plaintiff made out a case for recovery, and had a right to go to the jury. Whether defendant's case was likely to help him, or what view might be taken of the testimony on either side, the jury, under proper instructions, will have to determine.

The judgment must be reversed, with costs, and a new trial granted.

ASSUMPSIT WILL LIE TO RECOVER MONEY PAID WITHOUT CONSIDERATION: *Murphy v. McGraw*, 74 Mich. 318; *Nugent v. Teachout*, 67 Mich. 571; *Lane v. Boom Co.*, 62 Mich. 63; *McKinnon v. Vollmar*, 75 Wis. 82; 17 Am. St. Rep. 178; *Ingalls v. Miller*, 121 Ind. 188.

MAYWOOD v. LOGAN.

[78 MICHIGAN, 185.]

LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR UNHEALTHFUL CONDITION OF LEASED PREMISES. — The knowledge and concealment, on the part of the landlord, of the polluted condition of the water of a well on the leased premises, existing at the time of leasing, renders him liable for all the damages naturally resulting to the tenant and his family from the use of such water, including expenses of sickness and physicians' and nurses' bills.

LANDLORD AND TENANT — UNHEALTHFUL CONDITION OF LEASED PREMISES — RIGHT TO TERMINATE TENANCY. — Where the water in a well on the leased premises, at the time of the leasing, is so polluted as to render its use unhealthful, and this fact is known and concealed by the landlord, its discovery by the tenant justifies him in removing from the premises and terminating the tenancy, if the cause of pollution cannot be removed, because it amounts to an eviction, after which the tenant is not liable for rent.

LANDLORD AND TENANT — UNHEALTHFUL CONDITION OF LEASED PREMISES. — The landlord must see that leased premises are in a healthful condition at the time of leasing, or at least disclose to his tenant any fact within his knowledge which tends to make such premises unhealthful and unfit for habitation.

Hiram L. Chipman, and E. F. Bacon, for the appellant.

W. T. Bope, and W. T. Mitchell, for the respondent.

LONG, J. This is an action of *assumpsit* to recover rent of premises leased to defendant for a dwelling-house and home for his family. Defendant occupied the premises from May 11 to October 13, 1888, under a verbal agreement to pay seven dollars per month. He paid no part of the rent, but on the trial defended upon the ground that the well of water situated there, which his family used, was polluted by the carcass of a dead dog, so that his family became sick, and that he was put to expense in caring for them, for services of physicians, nurses, etc. These damages defendant claimed the right to recoup on the trial.

It appears, from the defendant's evidence, produced on the trial, that shortly after defendant's family, consisting of his wife and two small children, took possession, they noticed something wrong with the water in the well, and complained to the plaintiff. Plaintiff took a man, and caused an examination to be made, and the man going down into the well found therein the putrid carcass of a dead dog, and so rotten that the hair was then coming off. Plaintiff was advised of this fact, but caused the pump to be put back, and the covering nailed down, leaving the carcass of the dog in the well.

He then stepped to the door, and informed Mrs. Logan, wife of the defendant, that there were some rotten boards in the well, and that she better not use the water for cooking and drinking, but that it was all right for washing and scrubbing. He gave her no intimation of the real situation. The family used the water for three or four days for tea and cooking, and washing potatoes, etc. Within a week or two, defendant's family heard rumors that a dog was found dead there, and the defendant went to the plaintiff, and inquired as to the truth of these rumors. The plaintiff denied them, and said there was no dog there, and said the water was all right for washing, or purposes of that kind, but probably was not as good as might be, for drinking or cooking purposes. The family, after these inquiries, continued the use of the water, the children pumping and drinking it.

The real facts were not discovered until the middle of October, when defendant moved out. During this time the children, who had before been well, became sick with malaria, and nurses and physicians were paid forty-three dollars for their care. After the family moved out, and discontinued the use of this water, the children recovered.

The dog was in the well at the time the premises were rented. Before the defendant had arranged for taking possession of the premises, he talked to plaintiff about this well, and whether the pump was all right, and was assured that it was. The plaintiff does not deny the finding of the dog there at the time the examination was made, admits that the man told him he thought it was there, but claims that he advised the family not to use the water, and he denies telling the defendant that there was no dog in there. He did not, however, tell the family what he found there. In fact, it appears that they were wholly unconscious of its presence in the well, and continued the use of the water, supposing the only reason of the bad smell of the water was from some decayed wood or plank which had fallen in.

The issues thus presented were submitted to the jury, the court directing them that the contract of leasing was not a warranty of the quality of the water contained in the well, nor against the presence of dead animals, but if the plaintiff's attention was called to the bad quality of the water after defendant had gone into possession, and the plaintiff then undertook to make an examination, and found the dog there, and the dog had been there from the commencement of the

lease, and plaintiff did not communicate that fact to the defendant or his wife, the defendant would be entitled to recoup his damages.

The jury returned a verdict in favor of defendant for the sum of nine dollars. Plaintiff brings error.

Certain requests were proposed by plaintiff's counsel which the court refused, and we think very properly. We see no error in the charge of which plaintiff can complain.

It is evident, from the testimony in the cause, that the sickness of defendant's family is directly traceable to this polluted water. The jury, by their verdict, have found that the plaintiff knew of the presence of the dead animal in the well, and that he concealed all traces of it from the defendant and his family. It was there when the tenant's term commenced. When the plaintiff learned that this water was so polluted, his duty towards his tenant was to make the fact known, and if the fact had become known to the tenant, he would have been justified in removing from the premises, and terminating the tenancy, if the cause could not have been removed. It would have amounted to an eviction, and after which the tenant would not be liable for the rent. It was a great wrong for the plaintiff, after discovering the condition of affairs, to conceal the facts, and permit the defendant and his family to continue the use of the water for any purpose; and such concealment amounted to a fraud upon the rights of the tenant. If either party had a right to complain of the charge, it certainly was not the plaintiff.

The case was one, under the circumstances, where the tenant had a right to rely upon the terms of his leasing as a warranty that the water was wholesome. Special inquiry was made as to the condition of the pump in the well. It was evident to the landlord that the tenant intended to use the water for family purposes, and though he may not have known of its polluted condition at the time of the leasing, he did know that the tenant was attaching importance to this well of water as a part of the premises to be leased, and assurances impliedly were given by him that it was all right. The defendant, however, is not here complaining of the charge.

In the matter of damages, the court also limited the recovery in too narrow a compass, in stating it could only be for actual damages sustained in procuring nurses and paying the physicians. The plaintiff knew of the presence of the

putrid carcass there, and confesses that he did not advise the family of it, and, if defendant's testimony is true, denied that there was any such thing in the water when questioned about it, thereby fraudulently quieting the inquiries of the defendant, and preventing him from making search as to the true cause of the bad odors of the water. These acts of the plaintiff, his examination of the well, and concealment and denial of the cause of the pollution of the water, permitting the defendant and his family to remain there, conclusively show that his understanding was, that the property was to be put and kept in a healthful condition as a part of his contract to lease, and he therefore became liable to all damages traceable to his acts and misrepresentations. The defendant and his family would have suffered no greater wrong if the plaintiff, when he uncovered the well and made the examination, had actually polluted the water by placing the animal there. He owed duty to the defendant, as landlord, to see that the premises were in a healthful condition, or at least to disclose any fact within his knowledge which tended to make the premises unhealthful, and not fit for habitation. By his concealment of the pollution of the water, and permitting the family to use it in ignorance of the fact, he made himself liable to damages for all the injuries which would naturally follow. In any view of the case, we think the plaintiff was treated on the trial, and in the charge of the court upon the question of damages, far too leniently.

The cause was tried in the justice's court before a jury, where the defendant prevailed, as well as in the circuit court, where it was again tried by jury. The plaintiff now brings the case to this court. We view the case as one of vexatious appeal, calling for some redress to the defendant.

The judgment of the court below will be affirmed, with costs, and in addition, the defendant will recover the sum of fifty dollars for vexatious appeal.

LANDLORD AND TENANT — LIABILITY OF LANDLORD FOR CONDITION OF LEASED PREMISES. — For the law respecting a landlord's liability for leasing premises in an unhealthy condition, see note to *Gilbert v. Hoffman*, 55 Am. Rep. 265-269; note to *Bowse v. Hunking*, 46 Am. Rep. 474, 475.

EVANS v. STUHRBERG.

[78 MICHIGAN, 145.]

SALUS — FRAUD OF VENDOR — REMEDY OF INNOCENT PURCHASER OF VOID NOTE. — The innocent purchaser of an illegal and void note warranted to him by the vendor to be good and valid may recover its value or the money paid for it from such false warrantor, and he need not collect it of the maker, though able to do so.

Rollin H. Person, for the appellant.

Dennis Shields, and *B. T. O. Clark*, for the respondent.

MORSE, J. The plaintiff brought suit in the Livingston County circuit court, alleging, in substance, that the defendant sold her a note for two hundred dollars, executed by one Charles E. Holdridge, representing to the Rev. James G. Doherty, who was acting as her agent in the purchase of the note, that the note was good and collectible, and that Holdridge was worth about five thousand dollars, mentioning the property which said Holdridge owned; that she relied upon such warranty in the purchase of the note; that said note was not good or collectible, and that said Holdridge was irresponsible and financially worthless; that the defendant represented that the note was given for a good, legal, and valuable consideration, when in fact it was a Bohemian-oat note, and worthless, and of no value; that she demanded payment of said note from the maker, Holdridge, who refused payment; that afterwards she caused a tender of the note to be made to defendant, and demanded payment of the same, or the refunding of the money paid by her to him for said note, which demand was refused by the defendant.

The defendant pleaded the general issue, and gave notice under said plea that after the note had become due, the maker, Holdridge, had offered and tendered the plaintiff, as payment or part payment of said note, a horse of the value of two hundred dollars, which plaintiff refused to accept. The plaintiff had judgment in the court below.

The testimony on the part of the plaintiff was to the effect that the defendant offered to sell the note to Mr. Doherty, who was a Catholic priest then stationed at Brighton. Father Doherty, as he is called in the record, had no money at the time, but thought perhaps plaintiff, who was his housekeeper, might buy the note. He spoke to her about it, and acted as her agent in the transaction. He testified that defendant told him that the note was all right, and represented that

Holdridge was good, and that, after all his debts were paid, he would have at least five thousand dollars left, and that the note would not have been purchased except for these representations of defendant. Testimony was also given tending to show that the note was a Bohemian-oat note of the usual kind afloat in this state, and accompanied by the usual bond, which had not been performed, and that the representations as to the financial worth of Holdridge were untrue. Plaintiff paid \$195 for the note. Defendant admitted that he knew the note was given for Bohemian oats when he sold it to Father Doherty, but testified that Holdridge told him that he went into the transaction for speculation, and that he was going to make money out of it,—“right immediately to pay it. He said, ‘You will certainly have it paid when it is due.’”

This was before he bought the note, and he says: “I would not have bought the note except for Holdridge’s assurances, because it was a Bohemian-oat note.”

Defendant paid \$180 for the note. He also testified that Holdridge told him that he would be pleased to have him buy it, because defendant lived near by, and he could pay it at home. He admits that he told Father Doherty that the note was good, and that Holdridge was good for it; did not tell him it was a Bohemian-oat note; did not tell him that Holdridge would have five thousand dollars left when his debts were paid. Evidence was also given on the part of defendant, tending to show that the maker of the note was financially responsible for the amount of it. It was shown that plaintiff made no effort to collect the note of Holdridge after the demand and refusal of payment.

The counsel for the defendant assigns as the principal error in the case that the court permitted testimony to be given showing the note to have been given for Bohemian oats, and instructed the jury that if the note was a Bohemian-oat note, it was not a good but a void note. It is argued that the plaintiff, having no knowledge that the note was given for Bohemian oats, and purchasing it before due, for value, was a *bona fide* holder of the note, and could collect it; that the maker never declined to pay it on the ground that it was a Bohemian-oat note, and never claimed that as a defense; that the note was a good note as soon as it passed into plaintiff’s hands, and that, therefore, the fact that it was a Bohemian-oat note in no wise affected its validity in her hands, and that such fact was entirely immaterial and irrelevant; that,

therefore, the case should have been submitted to the jury solely upon the maker's financial responsibility.

We think the circuit judge fairly submitted the case to the jury, and that he did not err in admitting the testimony as to the consideration of the note. The court instructed the jury that if Holdridge told defendant the note was all right, and that he would pay it when it was due, this would estop Holdridge from making any defense to the note, and that it would be a good note so far as its being given for Bohemian grain was concerned. This was as favorable as the defendant could ask, under the law as laid down by this court in reference to these notes.

This note was void between the parties, on the ground of public policy. It was also void and dead in the hands of defendant, as he had knowledge of the fraudulent transaction, unless something had occurred between him and the maker which estopped the latter from pleading its invalidity. Holdridge denied telling defendant that the note was all right, or that he would pay it, and the jury, it is admitted, upon this conflict in the testimony, found against the defendant. Then the case stands likes this: When defendant presented this note to Father Doherty he knew it was a void note; that he could not collect it. When he told Doherty that the note was good, and thereby induced him to purchase it for plaintiff, he cannot be permitted by the law to take advantage of his own fraud, or thus to evade the law, which seeks to discourage and prevent these illegal transactions. If this note was made good in the hands of the plaintiff because she was an innocent purchaser, she was made such innocent purchaser by the fraud of the defendant, who concealed from her not only the original consideration of the note, but warranted it to be a good note when he knew it was not a valid one, except as it might be made so by the success of his deception and falsehood. The law in such a case will not force the plaintiff to collect the note against the maker, though she may be able to do so, nor allow the defendant to reap a profit from his fraud, as well as to galvanize, by such fraud, a dead note into life. This would not be in accord with that public policy which forbids the contract in its inception, and which endeavors to prevent those engaged in it, or having guilty knowledge of it, to profit thereby.

The commercial law in favor of innocent purchasers was intended for the benefit of the innocent purchaser, and for the

security of those handling commercial paper in the due and honest course of business. It was not intended as a shield to those fraudulently putting in circulation illegal or void notes, or passing them upon innocent purchasers by fraudulent or false representations or warranties. And it is much better, if it can be done, that the innocent holder shall recover its value, or the money paid for it, from such false warrantor, than that he shall undertake to recover it from the maker.

There is no error to be found in the record, and the judgment will be affirmed, with costs.

PROMISSORY NOTES. — BOHEMIAN-OAT TRANSACTIONS ARE AGAINST PUBLIC POLICY; and notes arising thereunder are void between the makers and payees, or any other persons who have knowledge of the manner by which the notes have been procured: *Ward v. Doane*, 77 Mich. 329; *Sutton v. Beckwith*, 68 Mich. 303; *McNamara v. Gargett*, 68 Mich. 455. But to defeat such a note in the hands of a subsequent purchaser before maturity for value, it must be shown that he had knowledge of the character of the original transaction: *Davis v. Seeley*, 71 Mich. 209; *Mace v. Kennedy*, 68 Mich. 389. Compare also the case of *Hess v. Oliver*, 77 Mich. 598, *ante*, p. 421.

ELLIS v. HILTON.

[78 MICHIGAN, 150.]

MEASURE OF DAMAGES FOR NEGLIGENCE INJURY TO HORSE. — In an action to recover for the negligent injury to a horse, rendering him worthless, the measure of damages is the value of the animal, and the amount, not exceeding such value, expended in good faith for medical treatment under a reasonable belief that he could be cured or made of some value if properly cared for.

Pratt and Davis, for the appellant.

Lorin Roberts, and J. R. Adsit, for the respondent.

LONG, J. This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured.

It was conceded on the trial, by counsel for defendant, that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial his counsel stated to the court that plaintiff was entitled to recover a reasonable expense in trying to cure the horse before it was decided that she was

actually worthless. The court ruled, however, that the damages could not exceed the value of the animal.

A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury. Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him thirty-five dollars for cure and treatment. On his cross-examination, he also testified that the veterinary said: "There was hopes of curing her, if the muscles were not too badly bruised. He did n't say he could cure her. He thought that there was a chance that he might."

Dr. De Cow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles, the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident, from the testimony, that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure.

Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright, the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this thirty-five dollars in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation. Counsel for defendant contend that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total.

There may be cases holding to this rule; but it seems to me

the rule is well stated, and based upon good reason, in *Watson v. Proprietors of Lisbon Bridge*, 14 Me. 205, 31 Am. Dec. 49, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen, the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss."

In *Murphy v. McGraw*, 74 Mich. 318, it appeared on the trial that the horse was worthless at the time of purchase, by reason on a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse, the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense, and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

INJURY TO ANIMAL—MEASURE OF DAMAGES.—The hirer of a horse who, by improper feeding and watering, makes him sick, and returns him in that condition to the owner, is liable for his full value, if the owner, by the use of reasonable care, and the employment of a suitable veterinary surgeon who treated him according to his best judgment, was unable to cure him, although the treatment was in fact improper and contributed to the horse's death: *Eastman v. Sanborn*, 3 Allen, 594; 81 Am. Dec. 677.

ADAMS v. IRON CLIFFS COMPANY.

[78 MICHIGAN, 271.]

NEGLECTANCE—PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE.—In a case where there is no eye-witness to an accident causing death, the presumption prevails, in the absence of evidence to the contrary, that the deceased used ordinary care and caution, and the presumption is sufficient to enable plaintiff to recover, upon showing negligence in the defendant.

CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY.—In an action where contributory negligence on the part of plaintiff is alleged, and under the facts shown there is a chance for different conclusions to be drawn by ordinarily candid and intelligent men, it is a question of fact to be determined by the jury.

HIGHWAYS—ACCEPTANCE BY LONG USER.—Public user alone, when sufficiently general and long continued, will constitute an acceptance of a country road, without proof that it was laid out or formally accepted by the highway authorities.

HIGHWAYS—CREATION BY PUBLIC USER—ESTOPPEL.—Where a corporation maintains a road across its property as a connecting link between other roads, and permits it to be used generally by the public for a long period, it thereby dedicates its use as such link to the public; and so long as it permits the public to use a crossing on such road without objection, it is estopped to deny that, as far as such crossing is concerned, it bears the same relation and duty to the public traveling upon it as if it were a public highway, and the corporation is bound to use due care and diligence in running its trains over such crossing, to prevent injury to passengers lawfully upon such road.

SERVANT, WHEN IN EMPLOYMENT OF MASTER.—A servant whose employment may require his services at any time during working-hours on his master's premises, and who is not authorized to leave them at will to attend to his private business, is not out of the employment of his master during working-hours until he is off of his premises.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE—ASSUMING RISK OF EMPLOYMENT.—An inside founder in a blast-furnace who has a separate department, and nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, and who has no control beyond his own work, is the fellow-servant of an engineer whose duty it is to run cars to and from such furnace, and in entering the employment assumes the risk that the cars may be handled negligently by such fellow-servant.

Hayden and Young, for the appellants.

W. P. Healy and Archibald B. Eldredge, for the respondent.

MORSE, J. This action is brought for the death of James A. Root, on March 8, 1886, by the alleged negligence of defendant. The court directed a verdict for the defendant, upon several grounds:—

1. The declaration alleged that the accident occurred on a public highway, and that the deceased was therefore entitled

to all the rights and privileges of a traveler on a public highway. The court found that there was no testimony tending to show that the road in question was a public highway of sufficient force to be submitted to the jury, and held that this was the private road of the defendant, and that the public had acquired no rights in it, by user or otherwise.

2. The court found that the plaintiff's intestate must have been guilty of contributory negligence.

3. That none of the allegations in the declaration of plaintiffs as to defendant's negligence had any foundation in fact, except the averment that the engineer was negligent in starting his train without warning, and that as to this negligence of the engineer, such engineer was a fellow-servant of the deceased, and there being nothing in the case to show that defendant did not use due diligence in the employment of competent men, and no evidence that the engineer or brakeman was not competent, the plaintiffs could not recover for any negligence on the part of said engineer.

In order to fully understand the bearing and correctness of these rulings, it will be necessary to state some of the surroundings and circumstances of the accident, or killing of Mr. Root, as shown upon the trial by the plaintiffs.

The defendant corporation owns and operates a blast-furnace at Negaunee, on the line of the Chicago and North-Western railway. This furnace manufactures charcoal pig-iron. This requires room for cord-wood, charcoal, flux, and iron ore, as well as a yard in which to store the pig-iron. The furnace consists of two stacks, and a tract of land called the "furnace bank" is occupied in carrying on the business. This location is unfenced.

From the main line of the North-Western railway there ran up to the furnace, at quite a steep grade, two parallel tracks, and these two tracks connected with other tracks, that ran directly into the furnace. These tracks were built by the defendant, but belonged to the railway company, and were used by both the defendant and said company, as occasion required, but principally by the defendant. Across these two parallel tracks, called "furnace-tracks," there ran three different roads, or wagon tracks, all of which connected with a single road or highway leading from the city of Negaunee to Palmer, a village built up in consequence of the Palmer mine and other mines near it. The lower road across the furnace-track, and the one nearest the North-Western railway, was

the road principally used in going from Negaunee to Palmer, or "Cascade," as that village was sometimes called, and was known as the "Cascade road," and was the road used as a mail route between the two places.

Upon the morning of the day of Mr. Root's death, and about ten o'clock, defendant's engineer, John Beck, with one brakeman, John Wannamaki, had started from the furnace bank with an engine, backing from five to seven empty box-cars slowly down the grade towards the main line of the North-Western railway. As these cars reached the crossing, the brakeman, who was on top of them, saw some cars loaded with pig-iron, which were standing on the other furnace-track, get away from the control of the persons in charge of them, and start down the grade. He immediately set two brakes on what he called the front car, the one farthest from the engine, of his train, and ran down to help stop the cars on the other track. The cars on the first track were stopped over the crossing nearest the railway, and called by the plaintiffs the "Cascade road." He testifies that half of the forward car was over the crossing. The next crossing was also blocked by cars, but the upper crossing was open. This was seldom used, however. The testimony is not very definite as to how long these cars remained upon the crossing, the time being somewhere between five and fifteen minutes.

It is not shown how Mr. Root got under the cars, as no one was present when it happened. The last seen of him was a few minutes before, when he was going along the lower road or highway towards the city of Negaunee. When the brakeman stopped his cars, and before going to the help of the others, he ran back, and told Beck, the engineer, to stop there until he got back. He then ran down to the runaway cars. He jumped on top of them, and set the brakes, and stopped them. After they were stopped, he started to go back to his own cars. He did not signal the engineer to start. While going back he heard a yell, and saw the section-boss, Callaghan, running towards the brakeman's cars, which were moving down the grade. There was no bell on the engine of this train, but it was provided with a whistle, which plaintiffs claim was not blown before the starting. Mr. Root was found caught by his right hip, under the brake-beams of the rear wheels of the foremost car, as they were backing. He was lying on his back, with his face turned upward, and his head and body were outside the track. He was dragged in this

way down the track, until his body struck the guard-rail of the frog. The train was then stopped, and Mr. Root taken out. He died almost instantly after being released. How deceased was caught, and when, cannot be definitely ascertained, as when first seen the cars were moving, with his body caught and held under the cars as above stated. There were some blood-spots on the snow alongside the rail, beginning at a place a dozen feet or so from the traveled part of the road, over the crossing; and the marks of his body dragging from this point were seen down to the frog, about three hundred feet from the crossing. Along the south side of this furnace-track, and on the side where Mr. Root evidently attempted to cross, was a bank of snow about two feet high, and between this bank of snow and the cars there was not room enough for a man to walk. It was the theory of the plaintiffs, upon the trial, that Root, seeing the train remain so long, had undertaken to go around the car, probably supporting himself by placing his hands upon the side of the car while he walked on the bank of snow alongside, and the sudden starting of the cars had thrown him down and under the wheels.

The court charged the jury as follows: "Now, what evidence have you as to the manner of killing? We find the cars across the crossing. We find Mr. Root either under the rear car-wheels of the first or the second car. The height of the cars above the track was somewhere from two to two and a half feet. The track was of the usual width, we assume,—in the neighborhood of four or five feet wide. The deceased would have to go some way down the track in order to get across. Now, it is clear that there are three ways in which the deceased might have got under those cars. He might have attempted to have gone under there, under the assumption that the cars would stand there until he had time; he might have undertaken to have gone around, and the cars started, and he thrown down and thrown under; or he might have reached the end of the car, and been knocked down and run over when he reached the end. In either case, gentlemen, what was his duty? The plaintiffs claim that they would go to you, as I understand it, upon the theory that the deceased had gone around the car. Assume that to be the case, then you have heard the testimony in regard to the speed with which this train went down. I take it that in that case—that train and engine attached standing upon the track—it is notice to every one that that train may start at any time.

It is in law, in my judgment, clearly contributory negligence for persons to go along by the side of that car, where, if it moves, they are in danger of being thrown under, or to go around the end of the car, and be so near that when the train started, as it did here, they may be knocked down and caught under the cars. I take it, gentlemen, it is the law, a man may not go so near a train of cars as that, going around, under circumstances of this case, and still have a jury say that they will infer that he was in the exercise of due care and caution. It seems to me clear that it cannot be the law. If he attempted to get underneath the cars, and go across, then that was clearly contributory negligence. So I must charge you, gentlemen, that the plaintiffs in this case have failed to show you evidence from which you would have the right to infer that the deceased was in the exercise of proper care and caution. It would not do to leave juries to guess; there must be evidence from which they may find the substantial facts to entitle a party to recover."

This brings up squarely the question of contributory negligence in a case where there is no eye-witness of the accident. In such a case, while the rule is not relaxed that the plaintiff must show that his intestate was without fault, yet the presumption, in the absence of any evidence to the contrary, obtains that the deceased used ordinary care and caution in attempting the crossing, and such presumption is sufficient, under the rule, to permit the plaintiff to recover upon showing negligence in the defendant: *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Mynning v. Detroit etc. R. R. Co.*, 59 Mich. 257; 64 Mich. 102; 67 Mich. 680; *Kwiatkowski v. Grand Trunk R'y Co.*, 70 Mich. 549; *Chicago etc. R'y Co. v. Clark*, 108 Ill. 113; *Teipel v. Hilsendegen*, 44 Mich. 462.

The court was of the opinion that the deceased might or must have been caught in one of three ways, and that it would not do for the jury to guess as to the facts of the case. But one of these three ways by which the plaintiffs' intestate might have got under the cars, to wit, undertaking to go round the cars by walking on this bank of snow, and slipping therefrom under the cars, was, in the theory of the plaintiffs, the manner in which he did slip or fall under them, and the plaintiffs had the right, under the testimony, to go to the jury upon this theory, provided such an attempt to go round the cars was not contributory negligence on the part of the deceased. If there was, under the facts shown, a chance for

different conclusions to be drawn by ordinarily candid and intelligent men, it was a question to be determined by the jury, and not by the court: *Alexander v. Big Rapids*, 70 Mich. 226; *Crosby v. Detroit etc. R'y Co.*, 58 Mich. 463; *Teipel v. Hilsendegen*, 44 Mich. 462; *Luke v. Wheat Mining Co.*, 71 Mich. 364. And it seems plain, from the testimony of plaintiffs' witnesses, which alone must be relied upon for the solution of this question, as the whole case was taken from the jury, that this was the way the accident happened. The deceased could not have been at the end of the car, and there knocked down and run over, as it was clear, from all the testimony, that no wheel had passed over him, as he was found caught under the brake-beams of one of the rear wheels. Nor is it at all probable that he was attempting to crawl under the cars. The position in which he was found would indicate to most minds that he had slipped, and fell upon his back under the cars, and got caught in that position, and in the position in which he was first discovered, and remained until he was pulled out. Was it contributory negligence in the deceased attempting to walk along the side of the cars upon the ridge or bank of snow? I think the question was one eminently proper to be submitted to a jury, and one which a court has no right to decide.

It appears, from the testimony, that Mr. Root was a man between the age of fifty-nine and sixty years, and well acquainted with the location and its surroundings, and with the business of the defendant, and its method of conducting such business. He was founder in the blast-furnace, and a skilled man in the business. He knew that the train of cars before him were managed by a brakeman and engineer, without the aid of any other persons. The cars were on a steep downgrade, upon which they would not ordinarily, and could not with safety, be backed downward without the presence and work of the brakeman. Mr. Root had started to go down town with the evident intention of attending to some private business of his own. When last seen by Fuller, there were at that time no cars upon this crossing of the main road leading to the city of Negaunee. It is quite probable that Root saw these cars stopped upon the track before he reached it, and the brakeman leave them to go after the runaway cars. If such was the case, was it negligence for Root, as a prudent man, to undertake to walk around them, a distance of about a half a car or more, upon this snow-bank? Would an ordi-

narly prudent man have done so? I have my own opinion, which it is not necessary here to express, but I am satisfied, from what has already transpired in the case, that ordinarily intelligent, careful, unbiased men might differ in their answers to this question, and therefore it should have been submitted to the jury. It is claimed that between two hundred and three hundred feet away there was a clear crossing, which Root should have taken; but the query again arises, What would an ordinarily prudent man have done under the circumstances, knowing that the cars were set with brakes and stopped, and the brakeman gone to look after the other cars? Would he have tried to go a few feet around the cars, or would he have gone two hundred or more feet out of his way and back again, to find a clear crossing? This was for a jury to determine.

Unless the mere act of walking upon this snow-bank was negligence, because he was liable to slip thereon if not careful, I do not think it could be considered negligence in Root's attempting to pass around the car that blocked the crossing. If there had been no snow-bank there, but level ground, no one would claim that the attempt to walk around the car was in itself negligence; and whether or not the walking on top of this bank of snow was negligence was, under the testimony of the condition of such snow-bank, a question for the jury. It cannot be considered that he was bound to know, as claimed by defendant's counsel, that this train, without any brakeman upon it, and without any warning, was liable to move at any moment. How often in cities, where a number of tracks cross the street, do men and women pass around the end of stationary trains, when perhaps if they should happen to trip, and fall across the track, and the train start suddenly, without previous warning, they might be caught under it. In such a case, if the railroad employees were negligent, would it be said, as a matter of law, that the contributory negligence of the person injured must preclude recovery? I think not, and that the facts and circumstances would properly be submitted to a jury for them to determine whether or not there was negligence in such an attempted crossing.

The next subject of inquiry is the negligence of the defendant; and in this connection it will be proper to notice the testimony on the part of the plaintiffs as to this road, the crossing of which was blocked by this car. The circuit judge was satisfied that there was no evidence to go to the jury to

show it to be any other than a private road of defendant's, upon which it owed no duty to the public or to travelers. The declaration of plaintiffs avers it to be a "public traveled highway"; that Root was lawfully traveling upon such highway, and attempted, as he had a right to do, to cross the furnace-track at the highway crossing; "that while he was so attempting to pass along said highway, across said track at said crossing, without fault on his part, said cars and locomotive, without the ringing of a bell, or any other warning from said locomotive whatever, and in the absence therefrom of brakemen, and while apparently abandoned, and without any warning from any brakeman thereon, and in the absence of any flagman or watchman at said crossing, as aforesaid, and without any warning of any kind whatever to plaintiffs' intestate, suddenly started with said cars backwards across said crossing, the engine being at the rear of the train as it moved, and thereupon, by means of the neglect and misconduct of the defendant, as aforesaid, and without his fault, said James A. Root was thrown down and under said cars, run over, and pushed and dragged along, under said moving cars, a long distance, to wit, ten rods, and thereby so badly injured that he died within, to wit, two hours thereafter."

There was testimony on behalf of plaintiffs that this road had existed since 1863; that there is no other means of going and no other roads between Palmer and Negaunee. A creek called "Partridge Creek" is the south boundary line of the defendant's property. The highway crosses a bridge over this creek, which bridge was repaired at different times by the city of Negaunee. The village of Palmer in 1886 had eight hundred inhabitants. The mail between the two places has been carried over this road since 1872. The road did not run exactly where it does now, across the defendant's premises, until 1881. In that year these furnace-tracks were laid down, and the company made two crossings,—the one where Root was killed, and one above. Since that time the travel has gone over the road where the accident took place, except in cases of heavy loads, when they use the next crossing above. One witness, Mr. Kirkpatrick, testified that there was another little, narrow road running from Negaunee to Palmer, but it was a roundabout way, and used only for women to drive to the city who were in fear of the locomotive scaring horses on the road across the furnace premises. It was shown by this witness, on

cross-examination by Mr. Healy, of counsel for defendant, that it was customary in the Upper Peninsula for the public to use the private roads of mining locations without asking the consent of the owners. It was not shown that the public authorities of Negaunee had ever done any work upon this road within the limits of defendant's location, but testimony was offered and introduced tending to show work upon the road by the city authorities up to the line of such location; but this was afterwards excluded by the court.

I think it was competent to show that this road across the company's premises was a connecting link between a public road from Palmer to Negaunee, and that the testimony offered was proper for that purpose. No road was ever legally laid out between Palmer and Negaunee, but the plaintiffs claimed it was a road by user. This road was used by the public before these furnace-tracks were constructed, and when they were laid down the defendant made a substantial crossing for this road, planking it between the rails of its track. The furnace-bank was there in 1863, when this road was first used from Palmer to Negaunee, and such road passed over defendant's premises until 1881. When these tracks were laid in that year, the defendant, for its own convenience in making a crossing, changed the line of the road somewhat; but this does not change the situation.

There was competent testimony offered to show that the public had accepted the dedication of this highway by working upon it between Palmer and Negaunee up to the line of defendant's property on each side, and had repaired and maintained a bridge, half of which stood on defendant's premises. There is no doubt that it was a public road by user of more than twenty years, except upon the defendant's premises, and that the road upon its property was used for the same length of time as a connecting link between the two ends of this road by its full consent. It was not necessary that it should be laid out, or attempted to be laid out, by the highway authorities. It could become a public highway by user alone: *Bumpus v. Miller*, 4 Mich. 159; *Detroit v. Detroit etc. R. R. Co.*, 23 Mich. 209; *Baker v. Johnston*, 21 Mich. 319; *Wicks v. Ross*, 37 Mich. 464; *Peninsula Iron etc. Co. v. Crystal Falls*, 60 Mich. 533; *Kruger v. Le Blanc*, 70 Mich. 76.

This was a country road, and as such could be accepted by the public by user alone. It was not necessary to show that there had been a formal acceptance by the highway authorities.

Public user alone, when sufficiently general and long continued, will constitute an acceptance. See *Detroit v. Detroit etc. R. R. Co.*, 23 Mich. 209, citing *Green v. Canaan*, 29 Conn. 157; see also *Baker v. Johnston*, 21 Mich. 344, per Campbell, C. J.

Under the circumstances as shown by the plaintiffs, they were entitled to go to the jury on the proposition that the defendant, by keeping up this connecting link, and permitting it to be used generally by the public for a period of over twenty years, had thereby dedicated its use as such a link to the public; and also, that, at any event, as long as it permitted the public to use this crossing without any dissent, the defendant was estopped from denying that, as far as such crossing was concerned, it bore the same relation and duty to travelers upon it as if it were in fact a public highway, and was bound to use due care and diligence in running its trains over this crossing to prevent injury to passengers lawfully on this road: *Barry v. New York Cent. & H. R. R. Co.*, 92 N. Y. 289; 44 Am. Rep. 377.

It is not a sound proposition, either in morals or the law, that the defendant permitting the public to use a road across its premises for so many years, planking the crossings of its furnace-tracks for the accommodation of such public use, and allowing such road to be connected at one end by a bridge, partly upon its property, with the public highway leading to Palmer, and at the other end with the public road to Negau-nee, forming, by so doing, with these connections, the only road for public travel between these two places, can yet be authorized to treat every one, except its own employees, as trespassers while using this crossing. But this is the logical outcome of the claim made by defendant's counsel in this case; and such counsel contend that if, at the moment Root was injured, he was not in the employ of the defendant, he was nothing more nor less than a trespasser.

If the view that I have taken of this crossing be correct, then the engineer was negligent if he started the cars without any warning. This engineer, who was sworn for the defendant, testified that the brakeman signaled him to back the cars, which the brakeman denies. He also testifies that he blew the whistle three times before he started to back down. The testimony of the plaintiffs tended to show that no whistle was blown. Whether it was blown or not was a question for the jury.

The circuit judge ruled that the engineer was a fellow-servant of the deceased. If so, then the direction of the verdict in favor of the defendant was right.

It is claimed by plaintiff's counsel that Mr. Root was not in the employ of the company at the time he was injured. Conceding that the deceased had started to go down town to attend to some private business of his own, which he was in the habit of doing every day, or nearly every day, still, when this accident occurred, he must be considered to have been in the employ of the defendant. There was no stated time in which he was authorized by his employment to leave the service of the defendant and go down town, and attend to his business. It would appear that his duties at the furnace were not so exacting but that he could go about his private business at times without detriment to the defendant, and there is no doubt but he was permitted to do so. But his employment by the defendant was such that he was not authorized to subordinate its business to his own, and at any time during working-hours when he was on defendant's premises, his duty was to look after and perform his duties there. His duties were multifarious, and if, at any time, after he had started to go down town, and while on defendant's premises, any need of his services had arisen, it would have been his duty, under his employment, to have at once stopped and given such services. He was not permitted at any time to say in his own mind, "I will now leave the employment of the company at once, and go about my own business," regardless of what might occur on the premises before he left them requiring his care and attention under his employment. He was not out of the employment of the defendant until he was off its premises: *Broderick v. Detroit etc. Depot Co.*, 56 Mich. 261, 268; 56 Am. Rep. 382. While he was at the furnace location, he had the care and management of a portion of defendant's property, which would call for his attention and oversight. See also *Ewald v. Chicago etc. R'y Co.*, 70 Wis. 420; 5 Am. St. Rep. 178. If this accident had occurred after Root's day's work was ended, the authorities cited by plaintiffs' counsel would apply; but they do not touch the case at bar. See *Baird v. Pettit*, 70 Pa. St. 477, 483, and Taylor, J. (dissenting opinion), in *Ewald v. Chicago etc. R'y Co.*, 70 Wis. 433, and cases there cited.

The only remaining question is, Did the circuit judge err in holding, as a matter of law, that Root was a fellow-servant of the engineer? The business of the engineer, by his own tea-

timony, was to move the cars on the furnace-track as desired in the business.

"Q. Who gave you orders? Who was in control of you?

"A. When I first took the position, sometimes Mr. Corbett and sometimes Mr. Root. If the master-mechanic had anything to do,—wanted a car shoved, or machinery,—he would come and tell me what to do. After I got into the way of the business, I knew what to do, without there was any extra work to do. If there was anything extra to do, who wanted it done would come and ask me to do it."

Mr. Thompson was the master-mechanic, and foreman generally over the machinery. Alexander Maitland was the general manager of the whole business. He testified on behalf of the defendant that Root, as founder, had charge of the furnace. "Every man around working the furnace was subject to Root's orders. He had the right to order the master-mechanic, from the fact that if the machinery was out of order, or any pipes broken, he had the right to authorize that man to repair those, or he could n't run his furnace. He had the right to go to the blacksmith-shop, and tell him to make what was necessary for him for the proper use of the furnace. He had the right to go to the carpenter, and do the same thing. He had the right to go to Mr. Corbett, who had charge of all the laborers, and tell him to do whatever was required to be done for the successful running of the furnace. In fact, as founder, he ought to have those rights, or he could n't get along. I could n't be there to direct, and some one must have authority around the furnace, and the founder is supposed to be the man that knows all about the operations,— what is wanted to be done to run the furnace, and to be successful. To curtail his authority would be to hamper him and make the plant unprofitable. In regard to carrying out pig-iron, and where it should be piled, and who was to pile it, that was decidedly his business, because he was responsible for the proper grading of the iron, and proper piling of it; and I have always, in any matters regarding piling the iron,— I always consulted and talked with Mr. Root about it. He did n't take direct charge of the handling of the locomotive, from the fact that it was not necessary at all times, unless he desired a change. These departments might be organized for the purpose of lightening his labors to a certain extent. He would not have to look after them actively all the time. He

had the right to tell the engineer where to place his cars, and tell him to bring in what he wanted."

Mr. Corbett, a witness for defendant, testified that he controlled the men working outside of the furnace. He was bank-boss. Thompson, the master-mechanic, kept the engineer's time. The men that Corbett controlled loaded pig-iron, unloaded ore and stock charcoal in the shed. He directed the movement of cars at times.

On the part of the plaintiffs, Mr. West testified that he worked as assistant under Root for four years, and one year running an engine; that Root's duties as founder were the charge and control of the inside work of the furnace. He had nothing to do with the outside work, such as moving cars or engines about the furnace. "It was outside of his business. If he wanted anything done,—anything of that kind,—he went to the man who had charge of the outside work, the banksman, Mr. Corbett."

Witness thinks the engineer was under the control of the master-mechanic. "Root had no control or direction or right to direct the engineer or brakeman in the discharge of their duties. Beyond the discharge of his particular duties, he came into no particular contact with these outside men."

Root had fifteen men under him, that he hired himself, and outside of them he could n't order any one to do anything. When he wanted anything,—coal, ore, or work done,—he could request it, and that was all. Under plaintiffs' testimony, Root had a separate department, the inside work of the furnace, and had nothing to do with the other departments, except he acted through the general management or the foreman or boss of such departments. He had no control beyond his own work, though all were engaged in the same common object, to wit, the manufacture of pig-iron. If this makes him a fellow-servant of the engineer, then the court below was correct in its ruling.

By an equal division of this court, in *Sell v. Reitz etc. Lumber Co.*, 70 Mich. 479, it was held that the plaintiff, who worked in the saw-mill of the company, was a fellow-servant of the men in charge of the warehouse kept for the storage of salt. It appeared in that case that the saw-mill and salt-block were run in conjunction, but the business of one was really separate and distinct from the other. For that reason the court divided. Here it was all one business, but divided into different departments.

The general doctrine as to fellow-servants is laid down in the text-books as follows: "All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants": 2 Thompson on Negligence, 1026; Cooley on Torts, 544, note; Wood on Master and Servant, sec. 435; Mechem on Agency, sec. 668.

Nor does it make any difference that the servant guilty of the negligence is a servant of superior authority, unless such superior servant arises to the grade of the *alter ego* of the principal. There are certain duties, however, which belong to the master, which cannot be delegated to an agent or servant, so as to relieve himself of responsibility; among other things, the duty of selecting competent servants, the providing of suitable machinery and appliances, and a safe place to work. The duty of providing a safe and efficient method of moving trains upon these furnace crossings would come under this head. The engine was not provided with a bell, but there was a whistle, which, if used, would be sufficient warning of its approach. The negligence, if any, consisted in the obstructing of the crossing, and the sudden starting of the cars without blowing the whistle. This was the negligence of the engineer, who was a servant of defendant, against whom no charge of incompetency is made. I am satisfied that the circuit judge, in his ruling that the engineer was a fellow-servant of Root, followed the settled law of this state: *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102, 109; 11 Am. St. Rep. 564; *Michigan Cent. R. R. Co. v. Dolan*, 32 Mich. 510; *Smith v. Potter*, 46 Mich. 258; *Michigan Cent. R. R. Co. v. Austin*, 40 Mich. 247; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Greenwald v. Marquette etc. R. R. Co.*, 49 Mich. 197; *Gardner v. Michigan Cent. R. R. Co.*, 58 Mich. 584; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364.

It is suggested as an independent proposition that the risk of injury at this crossing from the management of this train of cars was not one assumed by the deceased in his employment; that there was nothing in the nature of his employment to subject him to such a risk. This suggestion is not tenable. These cars were running hourly and daily in the business of defendant. Without such running from the main railway line to the furnace, Mr. Root could not have operated the furnace, over which he had control. He not only relied

upon these cars, but called upon them to furnish coal, etc., for the uses of the furnace. He knew that they must pass over this crossing every few minutes, and he also knew that he must use the crossing more or less in his employment. He therefore assumed the risk that these cars might be handled negligently by his fellow-servants, the persons employed in running and managing them. The judgment must therefore be affirmed, with costs.

THE CASE OF *Hunn v. Michigan Central R. R. Co.*, 78 Mich. 513, was brought to recover damages for personal injury, where, by reason of the failure of a train-dispatcher to notify one of two engineers of a meeting-point established for their two engines, and to order one of them held at such point, a collision occurred, and a fireman on one of the engines was killed. The court decided that such train-dispatcher, having absolute control over that division of the road where the accident occurred, so far as the running and operating of trains was concerned, was not a fellow-servant with such fireman or other employees of the company acting under his orders. The court, speaking through Champlin, J., in determining the case said: "This court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow-servant while engaged in a common employment: *Michigan Central R. R. Co. v. Leahey*, 10 Mich. 193; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 105; 4 Am. Rep. 364; *Michigan Central R. R. Co. v. Dolan*, 32 Mich. 510; *Michigan Central R. R. Co. v. Austin*, 40 Mich. 247; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Day v. Toledo etc. Ry Co.*, 42 Mich. 523; *Michigan Central R. R. Co. v. Smithson*, 45 Mich. 212; *Michigan Central R. R. Co. v. Gilbert*, 46 Mich. 176; *Smith v. Potter*, 46 Mich. 258; *Greenwald v. Marquette etc. R. R. Co.*, 49 Mich. 197; *Henry v. Lake Shore etc. Ry Co.*, 49 Mich. 495; *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35; *Gardner v. Michigan Central R. R. Co.*, 58 Mich. 584-590. The rule is a salutary one in all cases of fellow-servants, where the master has exercised due care in the selection of competent employees, and has become pretty generally recognized by the courts of last resort in this country. But the question of who are fellow-servants still perplexes the judicial mind, and gives rise to a great diversity of opinion. Some courts go so far as to hold that if the master exercises due care in selecting employees, his full duty towards his servants is discharged, even though he selects one or more agents to represent him in overseeing, controlling, and carrying on the business, however large and extended it may be, if he retains the right of employing and discharging his servants. Others hold that so long as they are employed and paid by the same master, and are engaged in a common enterprise, they are fellow-servants. But this is the extreme, and denies substantially all liability of the master in a vast majority of cases, where enterprises of any considerable magnitude are carried on. Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined who are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear that a master is liable to his servant for an injury caused by his own negligence. The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego*, and the master is as responsible

for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons. Whenever the business conducted by the person selected by the master is such that the person selected is invested with full control (subject to no one's supervision except the master's) over the action of the employees engaged in carrying on a particular branch of the master's business, and acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. In *Quincy Mining Co. v. Kuts*, 42 Mich. 39, this court said: 'This duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to intrust its performance to a general manager, foreman, or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the general supervision of his business. If there is negligence in this, the master is responsible for it, whether the supervision be by the master in person, or by some manager, superintendent, or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority.'

As supporting the doctrine that a railroad company is liable for the negligence of its train-dispatcher which results in the death of one of the servants of the company under his control, the court cited *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 286; 52 Am. Rep. 590; *Smith v. Wabash etc. R'y Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Sheehan v. New York Central etc. R. R. Co.*, 91 N. Y. 332; *Booth v. Boston etc. R. R. Co.*, 73 N. Y. 38; 29 Am. Rep. 97; *Railway Co. v. Henderson*, 37 Ohio St. 549-552; *Washburn v. Nashville R. R. Co.*, 3 Head, 638; 75 Am. Dec. 784; *Chicago etc. R. R. Co. v. McLallen*, 84 Ill. 109; *Missouri Pacific R'y Co. v. Dwyer*, 36 Kan. 58; *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377; *Phillips v. Chicago etc. R'y Co.*, 64 Wis. 475; *Hannibal etc. R. R. Co. v. Kanaley*, 39 Kan. 1; *McKinne v. Railroad Co.*, 21 Am. & Eng. R. R. Cas. 539; *Gravelle v. Railroad Co.*, 10 Fed. Rep. 711; *Gilmore v. Railroad Co.*, 18 Fed. Rep. 866; *State v. Malster*, 12 Reporter, 783; *Murphy v. Smith*, 19 Com. B., N. S., 361; *Malone v. Hathaway*, 64 N. Y. 5; *Moran's Case*, 44 Md. 283; *Flike v. Boston etc. R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545; *Dobbin v. Richmond etc. R. R. Co.*, 81 N. C. 446; 31 Am. Rep. 512; *Cowles v. Richmond etc. R. R. Co.*, 84 N. C. 309; 37 Am. Rep. 620; *Dowling v. Allen*, 74 Mo. 13; 41 Am. Rep. 298; and, in addition, said: "In holding that the train-dispatcher is not a fellow-servant with the fireman, I do not consider that I run counter to the doctrine so often recognized by this and other courts, in relation to fellow-servants, in which, broadly stated, it is said: 'It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes. The rule is the same, though the one injured may be inferior in grade, and is subject to the control and direction of the superior whose act caused the injury, provided they are both co-operating to effect the same common object.

This cannot be applied when the superior causing the injury represents the master, and it is always a subject of inquiry to ascertain the nature and extent of the authority of the superior whose negligence caused the injury. If his authority and duties are such as the master must necessarily, either personally or by another, exercise and discharge, then the above rule does not apply. There are some authorities which hold that a train-dispatcher, and those operating trains under his control, are fellow-servants. It seems to me, however, that those authorities do not give sufficient prominence to the position which the train-dispatcher occupies in operating a railroad. He is the corporation for the time being, and exercises powers which neither the superintendent nor the president, nor any other officer or agent, of the corporation can interfere with. The defendant requested a charge to the effect that although the jury might find the defendant guilty of negligence, yet if the fellow-servant of deceased contributed to produce his death, the plaintiff could not recover. This request was rightly refused. The correct rule, and the reason for it, is stated in *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 155, as follows: 'The servant does not agree to take the chance of any negligence on the part of his employer, and no case has gone so far as to hold that where such negligence contributes to the injury the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured': *Grand Trunk R'y Co. v. Cummings*, 106 U. S. 700; *Keegan v. Western Railroad Co.*, 8 N. Y. 175; 59 Am. Dec. 476; *Chicago etc. Railroad Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206; 2 Thompson on Negligence, 981; *Perry v. Lansing*, 17 Hun, 34; *Busch v. Railroad Co.*, 29 Hun, 112; *Gray v. Railroad Co.*, 24 Fed. Rep. 168."

The learned judge further said that, "under defendant's claim of contributory negligence of fellow-servants running the trains in violation of the rules of the company as to speed, testimony was admitted by the court tending to show that a strict compliance with the rules was impracticable, and that they were lived up to as nearly as they could be, and the trains run on the time allowed by the schedule prepared by the company. We think it was competent to show what was usually and habitually done in the running of trains, because, if the company permitted, or had so framed the rules as to require, the employees to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold it employees to the very letter of the rule in order to shield the company from liability for what it had tacitly permitted. But the admission of such testimony could not harm defendant, if it was the company's negligence that was the proximate cause of the injury, although a concurring cause was the negligence of a fellow-servant in running at a greater rate of speed than the rules allowed. The court gave full effect to the rules in its charge to the jury, so far as they were material, by instructing the jury that 'if you find, as a matter of fact, that the collision resulted entirely from the negligence of one or both of the engineers of engines Nos. 120 and 177, the defendant is not chargeable with the consequence of that negligence.' There was testimony introduced tending to show that the deceased was earning nine hundred dollars a year at the time of his death, and was twenty-seven years of age. A witness was then introduced, and he was permitted to testify that he had made a computation of the present value of an annuity based upon the expectancy of life of a man of the age of twenty-seven years on an income of \$900, and that its present value was \$10,725.30. The court also, against defendant's objections, per-

mitted the mortality tables found in section 4245, Howell's Statutes, to be admitted in evidence, and the Northampton tables for showing the present value of a dower interest, or of an annuity, found upon page 242 of Cheever's Probate Law. Mrs. Hunn also testified that her husband's earnings were her only means of support; that he owned a place at the time, worth about two thousand dollars. She was also permitted to testify, against defendant's objections, that there was an encumbrance upon the place of eleven hundred or twelve hundred dollars. There was also considerable testimony introduced as to his physical health, and as to his being afflicted with varicose veins and varicose tumors, and how such disease would impair his health, or affect the probable duration of his life. In respect to the admission of this testimony, the judge rules that the mortuary tables contained in Howell's Statutes were properly admitted, as tending to show Hunn's expectancy of life at the age of twenty-seven; citing *Balch v. Grand Rapids etc. R. R. Co.*, 67 Mich. 394. Such tables are not, however, conclusive; they only show the probable age which a healthy person whose age is given may expect to reach. When that fact is before the jury, as is also the physical condition of the deceased at the time of his death, together with all testimony reasonably affecting his duration of life, it is for the jury to determine the probable duration of the life had it not resulted from the injury. The estimate of the witness as to the value of deceased's life was properly excluded. The jury assessed plaintiff's damages at \$7,575, and this defendant claims is excessive, but this does not present a question of law. If the jury is properly instructed, and no improper testimony affecting the subject of damages is admitted, the amount awarded is beyond the reach of a writ of error. It was error to admit the testimony showing the extent of the means of the family of the deceased, and that there was an encumbrance upon his land, as this had no tendency to show what they were accustomed to receive, or had reasonable expectation of receiving, in his lifetime: *Chicago and North-Western R'y Co. v. Bayfield*, 37 Mich. 214. As this testimony was admitted as having some bearing upon the measure of damages, it must be presumed that it formed an element in the estimation of damages by the jury. For this error the judgment is reversed, and a new trial granted."

ATTORNEY-GENERAL v. COMMON COUNCIL OF DETROIT.

[78 MICHIGAN, 545.]

- ELECTIONS.** — EXPENSE ATTENDANT UPON OBEDIENCE to a valid election law is not a defense for not obeying it.
- CONSTITUTIONAL LAW.** — ELECTION LAW which provides that inspectors shall act as a board of registration of voters before election day, but which does not provide inspectors for every voting precinct, and which may therefore result in the disfranchisement of the electors of such precinct for want of registration, is unconstitutional and void.
- CONSTITUTIONAL LAW** — ELECTIONS. — Constitutional authority to enact laws "to preserve the purity of elections and guard against abuses of the elective franchise" does not authorize, by direction or indirection, the disfranchisement of an elector without his fault or negligence.
- CONSTITUTIONAL LAW.** — ELECTION LAWS to regulate elections, preserve their purity, and guard against abuses of the elective franchise must be rea-

sonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote.

CONSTITUTIONAL LAW — ELECTIONS. — The constitutional term of voting residence cannot be increased by statute under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will.

CONSTITUTIONAL LAW — ELECTIONS — REGISTRATION. — An election law providing for the registration of voters, but making no provision by which an elector who is sick or absent on the days of registration can vote, is unreasonable and void.

ELECTIONS. — REGISTRATION LAWS, or any law to preserve the purity of the ballot-box, may guard against abuses of the elective franchise, and prevent fraudulent voting, but cannot prevent any qualified elector from voting, or unnecessarily hinder or impair his privilege.

ELECTIONS — LAWS REGULATING. — To prevent fraud at the ballot-box, laws may be enacted making all needful rules and regulations to that end. They must not be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise, without their fault or negligence. The law must regulate the right to vote, by facilitating its lawful exercise, and preventing its abuse, but it must not impair nor destroy it.

CONSTITUTIONAL LAW. — ELECTION LAWS which compel a naturalized elector to produce his certificate, or show by evidence other than his own oath that such certificate was issued, before he will be allowed to vote, make an unfair and unnecessary distinction between native-born and naturalized voters, and are therefore unconstitutional.

CONSTITUTIONAL LAW. — ELECTION LAWS which provide that a native-born elector becoming of age between the last day of registration and the day of election may vote, but that a foreign-born citizen who has taken out his first papers, and whose right to vote will ripen between the completing of the registry list and the opening of the polls, cannot vote, are unfair and unconstitutional.

CONSTITUTIONAL LAW. — NO ELECTION OR REGISTRY LAW IS VALID which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. He cannot be deprived of such right, except by his own fault or negligence.

CONSTITUTIONAL LAW. — NO ELECTION LAW IS VALID which, under the pretext of regulation, destroys the constitutional right to vote, by annexing an additional qualification as to the number of days such voter must reside within the precinct before he can vote, or any other requisite in direct opposition to any constitutional requirement.

S. V. R. Trowbridge, attorney-general, Edwin F. Conely, and William P. Wells, for the relator.

John W. McGrath, for the respondent.

MORSE, J. At the last session of the legislature an act was passed, entitled "An act to preserve the purity of elections, and guard against abuses of the elective franchise, in the city of Detroit." This act was approved by the governor July 1,

1889, upon which day it took effect and became operative: Local Acts of 1889, p. 994.

The relator, in his petition, sets forth that the common council of the city of Detroit has neglected and failed to comply with the law, and still fails and neglects to do so, although well aware that the necessity of such compliance is reasonable and urgent; and that he believes that said common council intend to ignore the act entirely, and that such body intend to hold the city election, to take place in November, 1889, under the registration and election laws in force before the passage of this act, the same in every respect as if no such act had been passed. The attorney-general therefore asks that this court issue a peremptory *mandamus* to compel said common council to resubdivide into election precincts or districts, containing each not more than three hundred electors resident therein, such wards of the city of Detroit as may require it, under this act, and to provide suitable and proper means for the registration of electors, upon such subdivision or rearrangement, as the circumstances may require. The relator, from the records in the city clerk's office, makes a showing of the number of votes cast in each election district now existing in said city, sixty-one in number, at the November election in 1888. This showing, under the act, would necessitate the creation of 68 additional precincts, making a total of 129.

Section 1 of the act provides: "That as soon as possible after this act shall take effect, the common council of the city of Detroit shall, by ordinance, if it shall appear that at the election held in November, 1888, or at the election held in April, 1889, more than five hundred votes were cast in any election precinct, again divide the ward or wards in which such precinct or precincts may be, and establish new election precincts or districts therein, if necessary, or rearrange the same so that each precinct shall contain, as near as may be, an equal number of electors, no precinct to contain more than three hundred electors resident therein; and as often as it shall appear, after any election thereafter held, that more than six hundred votes have been cast in any election precinct, said precinct shall, within six months after said election, again be subdivided, or the precincts of the entire ward be rearranged and divided, so that each precinct shall contain three hundred electors, as near as may be, resident therein."

Section 2 provides that for the registration, as provided by the act, to be held in 1889, the inspectors of election selected at the last election shall act, and hereafter four persons for each election precinct, respectively, residents and electors therein, shall be selected in the manner now by law provided for the selection of such inspectors in said city, to act as a board of registration for such precinct, and such board shall elect one of its number as chairman. Said section also constitutes these boards of registration election inspectors, and in case of the unavoidable absence at any time of any member of the board, the remaining members may temporarily appoint another person to act in his stead until he appears.

The remaining twenty-three sections of the act relate to the manner and effect of the registration of voters, some of which sections will be noticed hereafter.

The common council of the city of Detroit, in answer to the order to show cause why the writ of *mandamus* should not issue to compel them to obey this law, says: —

1. That a compliance with the law would create in all 129 voting districts; that the expense of such compliance for the approaching municipal election would be over twenty-three thousand dollars, and probably twenty-five thousand dollars; that the amount to be raised for this purpose upon the assessment and levy for taxes this year is but six thousand dollars; the act was passed after such assessment and levy, and makes no provision for the expense attending and necessary to its execution; that there is no money in the contingent fund of the city, and such expense can lawfully be paid from no other fund.

2. That there are at least thirty-five thousand voters in the city of Detroit, of whom there are at least five thousand foreign-born electors who have taken out their naturalization papers, or declared their intention to become citizens, without the state of Michigan; that large numbers of persons so naturalized in other states have voted, from year to year, from five to forty years, within the city of Detroit, and their citizenship has been open and notorious, and their qualifications as electors conceded; that many of them have not now their citizenship papers, but the same have been lost or destroyed; that in many instances it would be impossible to procure certified copies of the same, or any record evidence of their issue; but said electors are able to procure abundant evidence of their exercise of the rights of citizenship, and of electors; that

under laws heretofore existing, these men have been able to produce sufficient evidence of their rights as electors, but that the act under consideration here practically disfranchises these, at least fifteen hundred people, who are in fact and in law qualified voters in said city.

3. That this law will also disfranchise a large number of electors, residents of Detroit, who do business outside of and away from said city, as such persons will necessarily be absent from the city during the days fixed by this act for registration.

4. That it will also disfranchise those persons who from sickness are unable to appear before the boards of registration on such days.

5. That it will disfranchise those moving from one ward to another after the last day of registration, who are electors under the constitution and general laws of the state as to qualifications of voters.

6. That there are at present five duly elected election inspectors in each of the present sixty-one election precincts.

That for these reasons, and for other good and substantial reasons appearing upon the face of the law, the act is inoperative, burdensome, unreasonable, unconstitutional, and void.

Upon hearing and argument of this matter upon petition and answer, we, on October 11, 1889, denied the application for the writ. The reasons for so doing will now be stated.

The first objection, as to expense, we did not consider, as it could not be alleged as a sufficient reason for not obeying a valid law.

But a serious difficulty arises in the outset as to the operation of this law. If we were concerned only with the question of dividing the wards of the city into election districts containing not more than three hundred electors, — certainly a desirable thing, — there could be no hesitation in granting the writ; but the object of this law is, not simply to create voting districts where the electors shall not exceed this number, but it is a scheme for a new system of registration, and requiring that all persons not complying with the rules and regulations of such registration shall not be permitted to vote, under any circumstances whatever, under heavy penalties. The machinery for the approaching municipal election is not provided by the law, except as it undertakes to provide the same from the law now in force, and which it undertakes to repeal. By this neglect to provide for this emergency, we think the

act is inoperative. There are now sixty-one election districts, with five inspectors in each, making in all 305 inspectors. Under this act there must be 129 districts. Under section 1 of the act, by the statement of votes cast in November, 1888, found in relator's petition, there are but three wards—the fourteenth, fifteenth, and sixteenth—that will be undisturbed. In the other thirteen wards there are precincts in each that cast over five hundred votes. These wards must be rearranged and subdivided, and 120 districts created in all therein. There are three precincts each in the remaining wards. An inspector cannot act out of his own precinct; and consequently forty-five of those now in office will remain in these three wards as before. But of the remaining 260 inspectors who are to act in the 120 districts to be created, none of them can act out of the wards or precincts in which they live. As far as their duties as inspectors of election are concerned, there would be no trouble, as the people at the opening of the polls would have an undoubted right to fill all vacancies by election on the spot, or to create an entire new board, if there were no inspectors left in such precinct by the new division and arrangement of the ward.

But it is different with such inspectors acting as a board of registration before election day. The authority to fill vacancies, or to create an entire new board of registration, must be found in the laws. There is no inherent right in the people to do it. This law makes no provision for filling any vacancies in the inspectors acting under the present law. There are but 260 inspectors for 120 districts,—a fraction over two for each. It must necessarily happen that in the new subdivision of these wards some precincts will have more than their proportion residing within their limits, and some less, and some will have none. If any precinct should, in such division, be left without any inspectors residing within it, the inevitable result, under this act, would be the disfranchisement of the electors of such precinct for want of registration: *People v. Kopplekom*, 16 Mich. 341. There is no provision in this act providing for any such event, and having repealed all other registration laws in the city of Detroit, there are no existing statutes to aid or remedy the difficulty.

But, in my view, the law is unreasonable and void in that it undertakes to disfranchise a large number of voters, through no fault of their own, and to make an unjust and unlawful distinction between the rights of native-born and naturalized

citizens and electors. The constitution authorizes the legislature to enact laws "to preserve the purity of elections, and guard against abuses of the elective franchise"; but this does not authorize, by direction or indirection, the disfranchisement, without his own fault or negligence, of any elector under the constitution: Art. 7, sec. 6.

The constitution provides that, "in all elections, every male citizen, every male inhabitant residing in the state on the twenty-fourth day of June, 1835, every male inhabitant residing in the state on the first day of January, 1850, who has declared his intention to become a citizen of the United States, pursuant to the laws thereof, six months preceding an election, or who has resided in the state two years and six months, and declared his intention as aforesaid, and every civilized male inhabitant of Indian descent, a native of the United States, and not a member of any tribe, shall be an elector, and entitled to vote; but no citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this state three months, and in the township or ward in which he offers to vote ten days next preceding such election."

There is also a provision as to electors in the army or navy, not necessary to be here recited: Art. 7, sec. 1.

By this section of the constitution it will be noticed that there are five distinct classes of persons who are made electors, and the only qualification to any of these classes is, that the elector shall be of age, and have resided in the state three months, and in the township or ward where he offers to vote ten days, next preceding the election. It cannot be for a moment contended that by section 6 of article 7 the framers of the constitution intended to give the legislature the power to arbitrarily disfranchise any elector who is such under section 1 of the same article, or to make any difference between the rights of any of the classes of electors therein specified, or to put obstacles in the way to the ballot-box for one class, while the road is left open to another. The laws to regulate elections, and to preserve their purity, and to guard against abuses to the elective franchise, must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote: *Capen v. Foster*, 12 Pick. 488; 23 Am. Dec. 632.

Let us examine the act before us: See Local Laws of 1889, p. 994. The plan of registration under this law is extensive

and minute in its details. In this discussion we shall only concern ourselves with its general features and results. It provides that in the year 1889, and again in 1892, and every fourth year thereafter, — striking, by design or accident, a presidential election year, — there shall be a new and complete general registration of voters in the city of Detroit. And it is made the duty of every elector to see that his name is registered in compliance with the requirements of the law, and he shall not be deemed to have acquired a legal residence in the precinct unless he has so caused himself to be registered, “nor shall any ballot be received by the inspectors at any election, under any pretense whatever, unless the name of the person offering such ballot shall have been entered in the register of the precinct in which he claims to vote as herein provided”: Secs. 3, 4.

The elector must personally apply to the board for registration, and such board “shall examine each applicant.” Persons who will be of age on election days, having the other qualifications of electors, may be entered on the register. “Every applicant, in the years when a general new registration is required, who has commenced to reside in such precinct, and who has resided therein at least two days,” if he be otherwise qualified, shall be entered on the register, and can vote on election day, if he has resided therein ten full days next preceding: Sec. 7.

The meeting of these boards of registration for 1889, and for 1892, and every four years thereafter, is first to be held on the first Monday of October, at which time the board sits for four days, and also again one day, on the fourth Monday of October. The law makes no provision for any other registration in the years of this new or general registration. In this year, the fourth Monday of October came on the 28th, and the city election on the 5th of November, there being seven days between the last day of registration and election day, but whenever the month of October begins on Sunday, Monday, or Saturday, more than ten days will ensue between the last day of registration and the day of election, and as the act requires that the elector must have actually resided in the precinct two days before his name can be entered on the registry-book, this act, in the years of general registration, will disfranchise every voter who has not resided sixteen or more days in the precinct before election day, whenever the month of October begins on either one of these three days. For in-

stance, in 1888, October began on Monday. The fourth Monday was the 22d. The general election day was November 6th, leaving fourteen full days between the last day of registration and election; and adding the two days, every elector not residing within the precinct for sixteen full days before the day of election, under this act, would have been deprived of his vote. This would be in direct conflict with the constitution, which makes him an elector upon a residence of ten days. No such regulation as this is reasonable. There is no good reason why the boards of registration cannot sit within the ten days before election, and thereby preserve to each elector his constitutional right. Nor is this all. If the legislature can make the residence twelve or sixteen days, it can make it a month, three months, or one year. This, in my opinion, cannot be done indirectly, under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will. And as one will contend that the legislature could prescribe by statute that a resident of the city of Detroit must reside in a precinct twelve days, sixteen days, or a month, before his ballot could be legally taken on election day, in the face of the constitution, which provides that he need reside therein but ten days.

But more unreasonable yet is this act, in that it contains no provision by which a person who is sick or absent on the days of registration can vote on election day. It may be said, with some show of reason perhaps, that a person who is absent on the registration days is himself in fault, in not returning to his home, and complying with the regulations which the legislature have a right to prescribe; but the man who is ill, and unable to attend to meetings of the board, but who is able to be out on the day of election, is deprived of his ballot, and for no good reason, that I can see. And neither do I think there is any necessity of disfranchising a large number of business men, who will be disfranchised, unless they drop important business, and travel many miles to be registered, some seven or more days before election. There are, under this law, but five days in the whole year that an elector can cause his name to be placed on the registry list; and this, unmistakably, by the provisions of the act, he must do personally. The language of the supreme court of Ohio, in speaking of a similar statute of that state, which was by that court unanimously declared unconstitutional, seems very appropriate here: "It will be seen by the above there are but seven [five] days in the

year when voters can register. . . . There is no provision for registering at pleasure during the earlier part of the year, and no provision for proving qualifications on election day, and voting. And . . . it is declared that 'no vote shall be received at any election aforesaid unless the name of the person offering to vote be on the registry,' etc. A voter who is the oldest inhabitant of the ward, and an elector in it for the greater part of his lifetime, if from absence, however necessary or unintentional, during the seven days, cannot vote if his name is not on the registry. Many absentees may get home to vote, and if they were afforded opportunities during the year, might also register, whose right of suffrage must necessarily be lost under the act. How many mechanics may be absent, pursuing their trades, during the seven days? A large number of persons will be away on steamboat and other sailing craft, and elsewhere, earning a support. A large number of students, a great many of the class usually termed 'commercial travelers,' will be away, perhaps planning their trips to be home on election day. A large number of citizens in government employ, at Washington and elsewhere, will be at their posts of duty, and may return to vote, but would hardly have the opportunity to return on a different day to register. Even the members of this court might be unable to register, without a decided detriment to the public business, and might be compelled to elect between the neglect of important official duties and the loss of suffrage": *Daggett v. Hudson*, 43 Ohio St. 561; 54 Am. Rep. 832.

There is no state in the Union that has ever sustained a law like this, except Illinois. All of the registration laws that have been upheld by the courts of other states have contained some provision by which a sick or absent voter might not necessarily be disfranchised, excepting the law of 1885 in Illinois: See *People v. Hoffman*, 116 Ill. 587; 56 Am. Rep. 793.

In Massachusetts, the board must be in session one hour on the day of election: *Capen v. Foster*, 12 Pick. 485; 23 Am. Dec. 632.

In Iowa, an elector unregistered, but otherwise qualified, is permitted to vote upon showing a proper reason for not having registered in time, and furnishing the affidavit of a registered voter as to his proper residence: *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 177.

The election law of Kansas provides that the registry shall close ten days before election, but permits the voter to register

at all times during the year, except on these last ten days: *State v. Butts*, 31 Kan. 537. See also R. S. Me. 95; N. J. Rev., p. 364, sec. 152; Md. Sup. Code, 240 et seq.; Ala. Code, p. 230, sec. 233; Dig. Laws Ark. 1874, p. 471, sec. 2328.

In Mississippi, registration is required, and the registration lists are to be kept by the clerk of the circuit court, and any person not on the lists may appear at any time before the clerk and be registered.

In Kentucky, a clause in a registration law applying only to the city of Louisville, which provided that the elector must reside in the city one year preceding the election, was held void, because the constitution required but sixty days' residence in a precinct, and one year in Jefferson County. The balance of the law was sustained, but registration was permitted by the act within the last three days preceding the election: *Commonwealth v. McClelland*, 83 Ky. 686.

The registry act of Missouri requires the registration of voters to be completed ten days before the election; but this is also a constitutional requirement.

In California, the elector may have his name entered on the list at any time before the poll of the election is opened; but if he does not do this thirty days before election, he must show a good reason why he did not procure the enrollment of his name previous to said thirty days: *People v. Laine*, 33 Cal. 55; *Webster v. Byrnes*, 34 Cal. 273.

In New York, as to cities, under the law of 1865, the board of registration met on Monday before election, which is the day before; and under the amendment of 1872 the registry is completed on the Saturday night before election. The question of its constitutionality has not been raised.

In *Byler v. Asher*, 47 Ill. 101, it was held that the registry law of Illinois was valid; but under that act the non-registered voter was allowed to vote on making proof, in the manner prescribed in the statute, of his right to vote, without showing any excuse for not registering. In *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793, a law was sustained which provided for the close of registration on the third Tuesday before election; but under the constitution of that state a man must reside in the voting precinct thirty days before election. Nothing is said in the opinion as to persons absent or sick upon the days of registration; but the law makes no provision for an after registry by such electors.

In Wisconsin, a registry law providing that no vote should

be received at any general election unless the name of the person offering to vote be on the registry as completed by the board, except in the case of a person becoming a qualified voter of the election district after the last day for the completion of the registry, who might vote on making certain specified proof of that fact, was held unconstitutional because it gave no opportunity for sick and absent persons to register and vote after the completion of the registry lists: *Dells v. Kennedy*, 49 Wis. 555; 35 Am. Rep. 786. Under this act, as shown by Taylor, J., in a dissenting opinion, at page 569, the sick or absent person, being advised of the days of registration, could send his application by writing. But in the act before us this cannot be done.

The registry law of Pennsylvania permits an unregistered voter to prove his qualifications and vote on election day: *In re McDonough*, 105 Pa. St. 490.

In Connecticut (see *Hyde v. Brush*, 34 Conn. 454), it appears from the opinion filed in that case that the registry lists must be closed on Wednesday of the week preceding the election, which would be from four to five days; but it is not stated what the opportunities are for registering before that time.

In our own state the provision as to sick and absent voters is well known; and so far no great abuse of the elective franchise has been developed from the exercise of the privilege therein granted of registering on election day: *Howell's Statutes*, sec. 93.

The object of a registry law, or of any law to preserve the purity of the ballot-box, and to guard against abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. Nor can the legislature, in attempting, ostensibly, to prevent fraud, disfranchise legal voters without their own fault or negligence. The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise, and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction: *Page v. Allen*, 58 Pa. St. 338; 98 Am. Dec. 272;

Dells v. Kennedy, 49 Wis. 555; 35 Am. Rep. 786; *Edmonds v. Banbury*, 28 Iowa, 267; 4 Am. Rep. 117; *Monroe v. Collins*, 17 Ohio St. 665, 685; *Daggett v. Hudson*, 48 Ohio St. 561; 54 Am. Rep. 832; *State v. Baker*, 38 Wis. 71; *State v. Butts*, 31 Kan. 554.

These authorities all tend in one direction. They hold that the legislature has the right to reasonably regulate the right of suffrage as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to return home to register as well as to vote, making two trips, when only one ought to be required.

This act is also not impartial. It seems to be aimed especially at naturalized voters, and, taken all in all, was fitly characterized by one of the counsel as "an act to disfranchise a large number of the legal voters of the city of Detroit." In providing particularly and minutely for the forms of entry in the books of registration (see sections 5-8), subdivision *h* of section 8 provides that,—

"*h*. In the column headed 'Court,' the designation of the court in which, if naturalized, such naturalization was had; or if a declaration of intention was made, the name of the court from which the certificate was issued; and if the applicant claims the right to be registered and vote as a naturalized citizen, or because he has declared his intention six months or more prior to the election, he must produce the proper certificate of such naturalization or declaration of intention, or satisfactory evidence, other than by the oath of the applicant, must be produced, that the same was issued."

By another subdivision of the same section there must be set down in this book the "date of papers," the time of such naturalization or the making of the declaration, "as appears by the certificates, or other duly authenticated evidence thereof": Subd. *g*.

The essence of these requirements is, that the naturalized voter must produce his certificate, or show, by evidence other than his own oath, that such a certificate was issued. And it would seem that if he cannot procure from the records of the

court evidence that such a certificate was issued, or declaration of intention made, he must produce some person, besides himself, who was present when the declaration was made or certificate issued. Perhaps, under a liberal construction of the law, one who could swear that he had seen the certificate would be a sufficient witness; but how is he to testify to the date, and the particular court that issued it, or that it was genuine? Why should a person claiming to be an elector by naturalization be debarred, if he has lost his certificate, from establishing such fact by his own oath? A person may swear that he is native-born, and he is not required, also, to prove this fact by some one else, before he can be registered; but if he wishes to show that he is an elector by naturalization, he is presumed to be unable himself to tell the truth under oath, and must be corroborated by some one. The easiest way for a person of this class, wishing to cast a fraudulent vote, would simply be to swear that he was born in the United States; and in such case a perjurer is put to less trouble to get on the registry list than an honest man who desires to show that he has been naturalized, but who, unfortunately, has lost the record evidence of such naturalization. This distinction between native-born and naturalized electors is an unfair one, and, as above shown, entirely unnecessary to prevent fraud. Its tendency will be to disfranchise honest men, and induce dishonest men to perjure themselves.

Section 13, in reference to removals from one precinct to another, and the necessary steps to become registered in such cases, seems to me most unreasonable and unnecessary; but perhaps this is within the power of the legislature, as it is not absolutely impossible to comply with it.

But in relation to naturalized voters, the very men who have probably lost their certificates, and cannot now replace them, are elderly men, who have been naturalized for many years, and have exercised the elective franchise in Detroit, without question, for upward of a quarter of a century. They have, many of them, no doubt, forgotten the particular name of the court in which they took out their papers; and to prove their issue by some one other than themselves would be, in some instances, impossible. A law that treats these men as men whose oaths cannot be taken in their own interest, while it permits a native-born citizen to prove his standing as a voter by his own testimony, cannot receive my sanction, as I believe such a requirement to be not only unjust, but uncon-

stitutional, unless applied to all. Another distinction may also be noted. A native-born citizen becoming of age between the last day of registration and the election is permitted to vote; but a foreign-born citizen who has taken out his first papers, and whose right to full citizenship or the elective franchise will ripen between the completing of the registry list and the opening of the polls, cannot vote.

In this minute and detailed plan of registration, with its provisions for an elaborate registry-book, only two classes of voters are recognized, to wit, native-born and naturalized. Three classes of electors, under the constitution, are provided for, unless Indians are to be classed with the native-born citizens without any particular designation of their own, and the male inhabitant residing here in 1850 who had declared his intention six months before an election, is to be classed with naturalized voters, and treated the same as the rest. But it is quite possible that there are persons now living in the city of Detroit who were "white male inhabitants" of this state in 1835. A man twenty-one years old then would be seventy-five now. This class were not required to be native-born, nor naturalized. They were made voters because they resided here at that date. There seems to be no place for such as these in this registry law, unless they are native-born, or can establish their naturalization. And it is by no means certain that the term "inhabitant" would not include all those who had a residence or fixed settlement and home in Michigan in 1835, although not then of age, if they have since lived in Michigan. If so, a larger number of voters would be affected by this act, as, strictly following the law, they are disfranchised by it.

In my opinion, no registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as well require of the elector entirely new qualifications, independent of the constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in

any other place in our state, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the constitution, then the remedy is with the people to alter such constitution by the lawful methods pointed out and permitted by that instrument.

This disposition to hamper and abridge the rights of the people to govern themselves, upon the theory that certain communities are unfit to control their own local affairs, which seems to be growing more prevalent in our legislative bodies in this country, must, nevertheless, if the idea be a correct one, be exercised in reason, and within constitutional limits.

This law being, in the respects pointed out, both unreasonable and in conflict with the constitution, and it being apparent that the legislature would not have enacted the other portions of the act had it foreseen that the courts would declare these parts unconstitutional, the whole act must fall, and be held unconstitutional and void: *Dells v. Kennedy*, 49 Wis. 560; 35 Am. Rep. 786, and cases cited: *Daggett v. Hudson*, 43 Ohio St. 561; 54 Am. Rep. 832; *Brooks v. Hydorn*, 76 Mich. 273.

ELECTIONS. — As to the constitutionality of registration laws, see note to *Copen v. Foster*, 23 Am. Dec. 642-651; *Daggett v. Hudson*, 43 Ohio St. 548; 54 Am. Rep. 832, and more particularly note thereto. A registration law which requires a voter, as a condition precedent to his registration, to state under oath that he is not a Mormon, is unconstitutional and void, because it indirectly exacts a qualification for the right of suffrage in addition to the qualifications imposed by the constitution: *State v. Findley*, 20 Nev. 198; 19 Am. St. Rep.

PINKERTON v. VERBERG.

[78 MICHIGAN, 573.]

UNDER CONSTITUTIONAL GUARANTY OF PERSONAL LIBERTY, one may travel along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in his safe conduct. No one can be restrained of his liberty unless he has transgressed some law.

CONSTITUTIONAL LAW — PERSONAL LIBERTY. — A law which places the safe-keeping and conduct of another in the hands of a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, is oppressive, unjust, and unconstitutional.

ARREST, WITHOUT WARRANT, FOR MISDEMEANOR, by an officer of the peace, who does not see the offense committed, is illegal; nor will suspicion that the party has committed a misdemeanor on a previous occasion justify an arrest without warrant.

ARREST WITHOUT WARRANT—STREET-WALKER.—Although a conservator of the peace may arrest, without warrant, a street-walker or common prostitute who is on the street plying her vocation, still a mere suspicion that she is doing so, where there is no act indicating that she is there for that purpose, will not justify such arrest, nor render it legal.

Hampden Kelsey, for the appellant.

James H. Kinnane, for the respondent.

LONG, J. This action is brought by plaintiff to recover damages for assault and illegal arrest. Defendant, at the time of the arrest, was a policeman of the city of Kalamazoo, and claims to have arrested plaintiff because she was a street-walker.

It appears that plaintiff lived on Kalamazoo Avenue East, and some time in the forepart of August, 1888, went from her own home to a sister's, living on the corner of Church and Eleanor streets, in the city. There she met a younger sister, and the two went down into the city upon the main street; called into the Watkins House closets; and after plaintiff had shown the younger sister, who had no acquaintances in the city, around the city for a time, the two went together back to the home of the sister, when plaintiff started to return to her home, and in doing so she again passed the Watkins House, but on the opposite side of the street. After having gone some little distance from there towards her own home, she heard some one following her on the walk. She hastened her speed, but when near the railroad crossing, Mr. Verberg, the defendant, walked up to her side, and asked where she was going. She told him she was not going very far, and then he wanted to know where she lived. To this plaintiff responded that she did not know as that made any difference to him. Defendant then asked what her name was. She told him that did not make any difference to him, and that she was attending to her own business. Defendant continued to walk with her until she got to her own door, and she then told him that she lived there. Plaintiff then told him he was not much of a gentleman to be following her home, when he said not to give him any more sauce, or he would take her and run her in. Plaintiff then says: "I told him I had not done anything to be run in for; that I did not know what he could run me in for; I guessed I had not done anything out of the way; and so he took hold of me, and took me up town. When he got up to the corner of Water Street, I told him I was not going any

farther with him, and he got hold of me, and tore my dress pretty nearly all off of me, and tried to make me walk, and blew a whistle, and Mr. Warren, who was across the street, came over, and asked him what he arrested me for, and he said he had made up his mind that he would not take any more of my sauce, and when they got upon the corner they stopped there, and Mr. Warren told him he knew me; that I was a married lady. They went out to one side, and had a talk, and Mr. Warren said: 'You can do as you have a mind to; but I don't think you had better lock her up.' Mr. Warren walked down Main Street, and Mr. Verberg said I could go home if I wanted to; but if he ever caught me out again as late as that, he would take me and lock me up. It was then about half-past ten o'clock, and I went home."

Witness further stated that defendant took hold of her arm at and in front of her own house, and pulled her along as far as the railroad, and as far as Water Street, when he tore her clothes because she would go no farther.

Defendant gave his version of the affair, on his direct examination by his own counsel, as follows: "I saw her on this particular night by the Watkins House, with three other women, and they all went into the house. I slipped into the office of the Watkins House. They stayed in there a few minutes, and came out, and went up as far as Rose Street. They crossed over, and she came down the street alone. She went east on Kalamazoo Avenue. I walked down that way to see what was going to be done. I believed she was plying her vocation as a prostitute. She walked quite fast. I walked down to the Grand Rapids and Indiana railroad, caught up to her, and asked where she lived, and what her name was. She said it was none of my business. I said: 'I have asked you a civil question, and I would like to have you answer it.' She said: 'I don't have to answer any questions from you.' I said: 'Well, I have had orders to that effect, to make these street-walkers get off the street, or lock them up.' By this time she had got in front of her own house. I did n't know at that time that she lived there. She said: 'I dare you to arrest me.' She said I had no business down there; I had no business to follow her; she was attending to her own business, and I had to attend to mine. She dared me to lock her up, to arrest her. At first I started away. She hallooed after me: 'Will dare you to arrest me.' I came back and said: 'Come on; if you want to go to jail, I can take you there.'

So we walked up as far as Dickinson's hardware-store, and she stopped, and I says: 'Come on; don't stop here.' She walked along then, and right in front of the restaurant, between the alley and back of McDonald's drug-store, she threw herself right down on the sidewalk, and I asked her to get up, two or three times. She refused to do it. I thought, by the way she acted and talked, she had been drinking. I did n't see any one around close by. I did n't want to have no regular wrestle there, so I blew my whistle, and Mr. Warren came up, and assisted me in getting her up. When we got her up by the corner of Main and Rose streets, she said, if we would not lock her up, she would go home, and she awfully hated to be locked up,—begged in that way. I spoke to Mr. Warren a few minutes, and finally told her if she would go home, I would let her go to-night, and if I caught her out again I would lock her up, as late as that." Witness further testified that he did not know that he tore any of her clothing.

It will be noticed that there is but little difference in the versions given by the parties to the controversy as to what took place on that occasion. The court, in his charge to the jury, stated:—

"The defendant claims that he had a right to arrest the plaintiff because he was at the time of making the arrest a policeman of the city of Kalamazoo, and that at the time of the arrest the plaintiff was engaged in the commission of an offense against the law.

"The charter and ordinances of the city of Kalamazoo provide that policemen shall have authority to arrest, without warrant, all persons who shall, in their presence, be guilty of any offense, misdemeanor, or breach of the peace, or who shall, in their presence, be guilty of any disorderly conduct for punishment of which a warrant could lawfully issue. Disorderly conduct for which an arrest might be made without a warrant, if committed in the presence of the officer, would include what is commonly termed 'street-walking.' That is the offense of a common prostitute offering herself for sale upon the streets at unusual or unseasonable hours, endeavoring to induce men to follow her for the purpose of prostitution; and in case such an offense is committed in the presence of an officer, a policeman has not only the authority, but it is also made his duty, to arrest the person so offending. So, in order to determine whether the defendant had the right to make the arrest complained of in this case, it will be neces-

sary for you to inquire and determine whether the plaintiff was at the time of the arrest engaged in the commission of any offense, or whether the defendant had any reasonable ground for believing she was.

"If you should find that at the time she was arrested by defendant she was conducting herself in an orderly manner, not committing any breach of the peace, or disorderly conduct, or offense against the law, and that the defendant had no reason to believe she was, then the defendant had no right or authority to arrest her, and the plaintiff would be entitled to a verdict; and in such a case it makes no difference what her past history may have been, nor what her character was, so far as any justification of the defendant was concerned. But if you find, from the evidence in the case, that at the time of the arrest the plaintiff was a woman of unchaste character, and was upon the street engaged in street-walking,—that is, if she was upon the street for the purpose of attracting attention, and inducing men to follow her for purposes of prostitution,—then the plaintiff is not entitled to recover, and your verdict should be for the defendant, unless you find that defendant used unnecessary force and violence in making the arrest.

"Or if you find, from the evidence in the case, that the plaintiff was at the time of her arrest by the defendant an unchaste woman, and known by the defendant to be so; and if you also find that she had at that time the reputation of being a common prostitute, whether that reputation was deserved or undeserved, and that this reputation was known to defendant; and if you further find that she was at that time upon the public streets, at such an hour and under such circumstances—if her conduct was such—that the defendant had reason to believe that she was engaged in street-walking,—then, whether she was so engaged in street-walking or not, the defendant would be justified in making the arrest, and unless you find he used unnecessary force and violence in making the arrest, your verdict should be for the defendant. The question, as I have already indicated to you, is not altogether whether the plaintiff was already engaged in street-walking, but whether the defendant had reasonable ground to believe she was, and made the arrest upon such ground. If he had reasonable ground to believe that she was engaged in street-walking, and made the arrest on such ground, then

defendant would not be liable, although, as a matter of fact, the plaintiff was in the streets for a legal purpose."

In order to better understand the force and effect of this charge, it will be necessary to consider the evidence, to some extent, that the court permitted the defendant to introduce. While the plaintiff was on the stand as a witness in her direct case, the counsel for the defendant was permitted, under objection of plaintiff's counsel, to ask her: "Your husband had you arrested the other day for assault and battery?"

It appears that this arrest was made after the time of the assault claimed to have been made in the present case, and the witness testified that she had never been arrested in her life, until the time when the defendant arrested her. In answer to the question propounded, she stated that her husband did cause her arrest for assault and battery. Witness was further asked, if, upon one occasion, officers Warren and Verberg did not call upon her one night, and find her in bed with one Charles Vose. Plaintiff denied this, and claimed that she had a room there, and worked for Charles Vose, and his father and mother, in their restaurant. It appears that several years before this arrest, plaintiff's husband had been arrested, and convicted, and sent to state prison for some offense, but had recently returned. The plaintiff and he were then living together.

The defendant, while on the stand as a witness, was permitted to testify that about a year previous he and another policeman visited the Gale Block, in which was the Vose restaurant, and there knocked on the door; that Mr. Vose came to the door, and being asked who was in there with him, answered that it was his wife; that he had also seen the plaintiff a great many times on the street at from ten to twelve o'clock, and that she did not seem to be doing any business, but just walking the street.

Plaintiff was recalled by the defense, and testified that she was never put out of the Gale Block in consequence of living with Mr. Vose; that he did not live there with her; that he had a room there, and she had a room, and a good many others had rooms there; that Mr. Miller, the janitor of the building, never told her to move out in consequence of the manner in which she conducted herself. Mr. Miller was then called by the defendant, and testified that plaintiff had rooms there; that he served papers to get Vose out, but was not

acquainted with the reputation of the plaintiff at that time; that he saw a man in there one night, but could not see if there was anything wrong; that it might have been Mr. Vose, as he told him they were going to be married in about a week. Witness testified that he saw men go into the big hall door, but could not say whether the room where they went was occupied by her.

Mr. Warren was also called, and testified to seeing plaintiff in bed with Vose. Other testimony of like character was also given by defendant, under objection of counsel for the plaintiff. Defendant also gave evidence of the general reputation of the plaintiff as a common prostitute. Plaintiff denied all the specific acts of lewdness to prove which such witnesses were called.

At the close of the testimony, the counsel for plaintiff asked the court to instruct the jury:—

“1. If the jury shall find that the plaintiff, at the time she was arrested by the defendant, was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.

“2. No officer is justified in making an arrest without a warrant, when the person whom he arrests is peaceable, and not engaged in open violence; as, for example, by fighting, engaging in a riot, or about to escape after committing a felony.

“3. The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace; as, for example, in fighting, or in a riot, or about to escape after having committed a felony.

“4. If the jury shall find that the plaintiff was, at the time she was arrested, walking on the street, without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.

“5. If the jury shall find from the evidence that the plaintiff, at the time of her arrest, was walking on the street in a lawful manner, then the jury would be warranted in going beyond actual damages, and giving the plaintiff a further sum as exemplary damages.”

These instructions the court refused.

It is insisted here that the arrest was legal, and within the

authority of the officer, under the provisions of section 3 of chapter 14 of the charter of the city of Kalamazoo. This section is as follows:—

"Sec. 3. The marshal and police shall have and exercise, within said city, all the power given by law to constables for the preservation of the peace and to apprehend and arrest offenders against the laws of the state. They shall have the power to enter any disorderly or gaming house, or dwelling-house, or any other building where a felon is known to be secreted or harbored, or where any person is who has committed any breach of the peace, or where any felony or breach of the peace has been committed.

"It shall be the duty of the said marshal and police, and they are hereby fully authorized, to suppress all riots, disturbances, and breaches of the peace; to arrest, upon view, all persons fleeing from justice; to apprehend, upon view, any person found in the act of committing any offense against the laws of the state; and to take such persons before the proper officer or magistrate, to be dealt with according to law; to make complaints before the proper officer or magistrate of any person known or believed by them to be guilty of crime or having violated any ordinance or regulation of said city; and to serve all process, writs, and warrants that may be delivered to them for that purpose, or that may be required in any prosecution for the violation of any ordinance or regulation of said city

"In prosecutions under any city ordinance or regulation of said city, the marshal and regular police thereof shall have the same powers and shall perform the same duties as are given to and performed by constables under the laws of the state; and, generally, they shall perform all such duties pertaining to their respective offices as may be required by the city council."

It is claimed further, by counsel for defendant, that the question whether the plaintiff was at the time of the arrest engaged in street-walking or not, or whether the defendant had reasonable grounds to suppose that she was, was a question for the jury, and, as such, was properly submitted to them; that it appears from the record the officer well knew the reputation of the appellant, and that she was a common prostitute; and, judging from her actions, the unseasonable time of the night, and the suspicious quarter of the city, it cannot be said the officer acted arbitrarily, or without good

and reasonable grounds for assuming and believing that the appellant was then and there on the public streets plying her vocation as a common prostitute. Counsel states as a further proposition that, "assuming it to have been true that the defendant acted upon an uncertainty, but had good and reasonable cause to believe that the plaintiff was conducting herself unlawfully and in a disorderly manner, and did so believe, he would still be justified in making the arrest in the manner that he did."

It is not claimed that the defendant had a warrant for the arrest of the plaintiff at the time he took her into custody and started to convey her to the jail, and it appears that no warrant had ever been issued for the plaintiff's arrest for that or any other offense. From the whole record, it appears that the only excuse offered by the defendant for the arrest on that night was, that he had heard her reputation as a common prostitute discussed by the police-officers of the city, and some others; had made up his mind that she was such; and had seen her frequently on the streets, sometimes at unseasonable hours, and at one time found her in bed with a Mr. Vose.

This is about the substance of the reasons given by him which led him on that night to believe she was on the street plying her vocation as a common prostitute. All he had seen that night was, that the plaintiff was down on Main Street, went into the Watkins House with three other women, and from there up the street for a distance, and turning, walked towards her own home. He does not testify nor claim that he saw her talking with any man, or that she accosted any man, or did anything more than walk along a public street towards her own home, as any decent or well-behaved lady might have done. She was even hurrying forward faster when she heard the defendant's footsteps rapidly approaching her as if to overtake her. When he had overtaken her, he asked her name and where she lived, and kept pace with her until she arrived opposite her own door. He was not successful in finding out her name, and claims the plaintiff told him it was none of his business. He started and walked away from her for a little distance, according to his own testimony, when she told him, or halloed at him, as he says, and dared him to arrest her, when he turned and said: "If you want to go to jail, I can take you there." He then made the arrest. Can anything be more certain, even from the defendant's own testimony, than that the arrest was made because, as plaintiff

says, she gave him some sauce, or as defendant says, she dared him to arrest her? He knew as well when he started to leave her whether she was on the street plying her vocation as a common prostitute, as he did when he made the arrest; and yet he turned away to leave, and only made the arrest when she dared him to make it.

If persons can be restrained of their liberty, and assaulted and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police-officer. Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. One may travel along the public highways or in public places, and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens there, they will be protected under the law, not only in their persons, but in their safe conduct. The constitution and the laws are framed for the public good and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guarantees. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the city of Kalamazoo may provide, no police-officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace committed in the presence of the officer; no suspicion of felony,—and yet, under the charge of the court, which counsel seeks to maintain here, a woman may, simply upon suspicion that she may commit an act which at most would only amount to a misdemeanor, be assaulted and imprisoned, if the officer has good reason to believe, and does believe, that she is plying her vocation in such a manner that it will result in an offense.

No more dangerous doctrine could be laid down. It is a doctrine which, if upheld, would place even the most respectable lady in the land under the surveillance of policemen, and give them authority to arrest and imprison upon mere suspicion of an offense, however insignificant; and if carried to the extent contained in the charge of the circuit judge, it would not matter how undeserved the bad character or reputation of such person might be. If idle gossip is once set afloat reflecting upon the character and reputation of the most virtuous woman, and that gossip once comes to the ears of the police-officer, he may act upon it, and be led to believe that the woman is upon the street intending to ply her vocation as a street-walker or common prostitute, and at once, without the formality of complaint or warrant, place her under arrest, and convey her to jail. The law has more regard for the liberty of the citizen, and there is a more decent and orderly manner of enforcing the law for the public good. The officer had no right to arrest the plaintiff, without warrant, upon mere suspicion that she was upon the street for the purpose of plying her vocation as a common prostitute, even under the provisions of the city ordinance above cited. Our statute gives no such right, and at the common law no such right existed. Suspicion that a party has on a former occasion committed a misdemeanor is no justification for giving him in charge of a constable, without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanor and another: 1 Archbold's Crim. Pr. & Pl. 102, note 1; 2 Hale P. C. 89.

An arrest for misdemeanor, without a warrant, by one who does not see the offense committed, is illegal. In *People v. Pratt*, 22 Hun, 300, it was held that an officer had no authority to arrest, without warrant, a common prostitute, unless disorderly conduct is committed in his presence. It is true that an officer, as a conservator of the peace, may arrest street-walkers or common prostitutes who are on the street plying their vocation; but a mere suspicion that they are doing so, where there is no act indicating that the party is there for that purpose, will not justify the arrest without warrant. In *Sarah Way's Case*, 41 Mich. 304, Mr. Justice Campbell, speaking upon the subject of arrest without warrant, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful, except in those cases where the public security re-

quires it, and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer: *Quinn v. Heisel*, 40 Mich. 576, and *Drennan v. People*, 10 Mich. 169."

The court was error in that portion of his charge relative to the defendant's acting upon his information and belief that the plaintiff was a common prostitute, as a justification for the arrest without warrant. The court was also in error in refusing to give the plaintiff's requests to charge. Each request stated the law correctly as applied to this case, and should have been given. The court was also in error in permitting defendant to introduce evidence of specific acts of lewdness on the part of plaintiff. On such a trial, it could not be expected that a party so attacked could be prepared to meet every issue so made.

The judgment must be set aside, with costs, and a new trial ordered.

ARREST WITHOUT A WARRANT. — Municipal police-officers may arrest persons without warrant who violate the law in their presence: *Veneman v. Jones*, 118 Ind. 41; 10 Am. St. Rep. 100; but if they make arrests under any other circumstances, they do so at their peril: *Leighton v. Hall*, 31 Ill. 106; 83 Am. Dec. 205. As to the arrest of street-walkers and suspicious characters without warrant when they are found going about at night, see note to *Roberts v. State*, 55 Am. Dec. 104.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

BULLITT v. FARRAR.

[42 MINNESOTA, 8.]

FRAUD — FALSE REPRESENTATION OF KNOWLEDGE. — Where a party makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified affirmation amounts to an affirmation as of one's own knowledge, and makes the fraud as great as if the party knew his statement to be false.

FRAUD — FALSE REPRESENTATION OF KNOWLEDGE. — Fraudulent intent in an action of deceit may be established by proof of a statement made as of the party's own knowledge, which is false, provided the statement is not merely matter of opinion, estimate, or judgment, but is susceptible of actual knowledge. In such case it is not necessary to prove an actual intent to deceive.

FRAUD — REPRESENTATIONS WITHOUT KNOWLEDGE. — Whether representations are made innocently or knowingly, they operate equally as a fraud upon a party who relies upon them in ignorance of the facts, provided they are false, and made unqualifiedly as of the party's own knowledge.

Rogers, Hadley, and Selmes, for the appellant.

Henry C. James, for the respondent.

COLLINS, J. Action to recover damages for deceit in the sale of a city lot. As claimed by plaintiff, the deceit consisted in false and fraudulent statements and representations made by the defendant—who made the sale as the agent or broker of another person—as to the grade of the lot. The plaintiff obtained a verdict, and his appeal is from an order granting defendant's motion for a new trial. There is nothing in the record tending to indicate that the court below did not consider each of the grounds urged in defendant's motion, viz., that the verdict was not justified by the evidence, and

that error in law occurred upon the trial, which was duly excepted to; but it seems evident that a new trial was granted because the court was of the opinion that it had erred in refusing to charge the jury, upon defendant's request, as follows: "1. In order to entitle the plaintiff to recover in this action, you must find that the defendant made to the plaintiff the representations alleged in the complaint, and that at the time of making such representations the defendant knew they were false, or having no knowledge of their truth or falsity, he did not believe them to be true, or that, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge."

It will be seen, upon an examination of *Humphrey v. Merriam*, 32 Minn. 197, that the principal portion of this request was taken bodily from the opinion in that case, which, on the facts, was wholly different from the one at bar. There the deceit consisted, as claimed by plaintiff, in false and fraudulent representations made by defendant's agent, making the sale of mining stock, as to the value, condition, and productiveness of a mine, and as to the company's indebtedness. From the plaintiff's own showing, the agent had never been at the mine, and hence had no personal knowledge of its character or condition, but made his statements from reports received and information derived from others, all of which was known by the plaintiff. The testimony, in the judgment of the court, entirely failed to show that this agent knew the representations to be false, or that he did not honestly believe them to be true, or that he misstated the extent or sources of his information. Under such a showing it was held that the plaintiff could not recover. Here, however, according to the allegations of the complaint, the deceit consisted of positive and unqualified statements made by the defendant, amounting almost to a warranty that the lot in question was not more than seven feet below street grade in front, and was above said grade in the rear; and the plaintiff's proofs tended to support the unequivocal allegation of his complaint on this point.

So far as the rules of law laid down in *Humphrey v. Merriam*, 32 Minn. 197, were pertinent to the facts then in hand, they were correctly stated; but the one bearing upon the case now before us may appear somewhat narrow and misleading when applied to other and different circumstances. As was said, the intent to deceive must exist, and must be proved, in

every case. If it is absent, there can be no fraud. In this case the defendant claims that he had no knowledge of the facts, and there was no testimony indicating that he had. Therefore he did not know his statements—assuming them to have been made as contended by plaintiff—to be false; nor was it shown that he did not believe them to be true, save as this might be inferred from the fact that he seems to have had no knowledge upon the subject. But, under the circumstances of this case, and from the plaintiff's testimony as to what was said by defendant when plaintiff bought the lot, which is considered by us as a positive and unequivocal assertion in regard to the grade made as of the defendant's own knowledge, the request to charge, rejected by the court, which included the proposition that, having no knowledge of the truth or falsity of the alleged statements, a recovery could not be had unless the defendant represented the statements to be true of his own knowledge, might, if given, have misled the jury. It might have been understood as prohibiting a recovery unless it appeared that defendant had unqualifiedly declared himself possessed of knowledge,—had asserted in so many words that he knew his statements to be the truth. Positive assertion of knowledge is not required. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it be true or false, it is a fraud. The falsehood is intentional. And an unqualified affirmation amounts to an affirmation as of one's own knowledge: *Stone v. Denny*, 4 Met. 151; *Wilder v. De Cou*, 18 Minn. 421, 470. The fraud is as great as if the party knew his statement to be untrue. It is, in law, a willful falsehood for a man to assert as of his own knowledge a matter of which he has no knowledge: *Kerr on Fraud and Mistake*, 54. A charge of fraudulent intent in an action for deceit may be maintained by proof of a statement, made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make proof of an actual intent to deceive: *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727, and cases cited. If the false representations are made as of one's own knowledge, or unqualifiedly, being such as might and did mislead, they are unjustifiable and fraudulent: *Merriam v. Pine City Lumber Co.*, 23 Minn. 314. As the language used in the request might have been construed by the jury as confining

them to a consideration of statements whereby the defendant expressly represented that he knew the grade of the lot (of which there was no testimony), and eliminated all consideration of affirmations wherein the defendant, without asserting actual knowledge in express terms, assumed to have it and to speak from it, or intended to and did convey the impression that he had actual knowledge of the truth, though conscious that he had not, the court was right in declining so to instruct the jury.

Although the general charge might have been more explicit and exact, it fairly covered the law applicable to the testimony, and no part of it was erroneous. Among other matters, the court said, the defendant excepting, that if the jury found from the evidence that the statements and representations complained of were made as claimed by plaintiff,—that is, if they were positive and unequivocal assertions as to the grade of the lot,—it made no difference whether the defendant knew the real facts or not. This was correct. Whether the representations were made innocently or knowingly, they would equally operate as a fraud upon the plaintiff, provided they were made unqualifiedly, or as of defendant's own knowledge: *Merriam v. Pine City Lumber Co.*, 23 Minn. 314. It is fraudulent to affirm what is false, knowing it to be false. It is equally as fraudulent to affirm what is false, knowing that the affirmation is of the existence of a fact about which one is in entire ignorance: *Wilder v. De Cou*, 18 Minn. 421.

The remaining assignments of error need no special mention.

Order reversed.

FRAUD. — FALSE REPRESENTATIONS as to matters material to a transaction, and upon which the party to whom they are made relies to his damage, constitute fraud, although the falsity of the statements were unknown to the party making them: *Woodruff v. Garner*, 27 Ind. 4; 89 Am. Dec. 477; *Frensel v. Miller*, 37 Ind. 1; 10 Am. Rep. 62; *Watson v. Baker*, 71 Tex. 739; *Busterud v. Farrington*, 36 Minn. 320.

REISAN v. MOTT.

[42 MINNESOTA, 42.]

MALICIOUS PROSECUTION—DECLARATIONS OF ARRESTING OFFICER AS EVIDENCE.—In an action of malicious prosecution for arrest without probable cause, the declarations of the arresting officer are inadmissible against defendant, in the absence of proof that the latter had given the former instructions.

MALICIOUS PROSECUTION—MALICE OF PRINCIPAL NOT IMPUTABLE FROM KNOWLEDGE OF AGENT.—In an action for malicious prosecution, actual malice cannot be conclusively presumed or legally imputed to the defendant as principal, from the knowledge of his agent.

MALICIOUS PROSECUTION—PRINCIPAL ACTING ON KNOWLEDGE OF AGENT.—A defendant in malicious prosecution is not liable as principal, if, acting on knowledge communicated to him by his agent, he institutes a criminal prosecution, in good faith, with due caution, believing that the offense has been committed, and acting upon grounds which justify that belief.

IN MALICIOUS PROSECUTION, MALICE is a question of fact for the jury.

MALICIOUS PROSECUTION—CONDITION OF FAMILY AS EVIDENCE.—In an action of malicious prosecution, the condition of plaintiff's family is inadmissible in evidence to affect the amount of general damages to be awarded.

MALICIOUS PROSECUTION—EVIDENCE TO SHOW PROBABLE CAUSE.—In an action of malicious prosecution for an alleged fraudulent disposal of mortgaged property, evidence of the amount of property owned by the plaintiff is admissible, as bearing upon the question whether the defendant had reasonable ground to believe that plaintiff had disposed of the mortgaged property with intent to defraud.

CHATTEL MORTGAGE—LIEN FOR EXPENSE IN COLLECTING.—Where a chattel mortgage provides that the mortgagee may, upon default, retain from the proceeds of the sale of the mortgaged property an attorney's fee and such other expense as may be incurred, he may charge and enforce the necessary expense of unsuccessful efforts to take possession of the property, notwithstanding a tender of the bare debt thereafter; but the attorney's fees cannot be collected, unless there has been a foreclosure.

Phelps and Calkins, for the appellant.

P. C. Schmidt, and H. Steenerson, for the respondent.

DICKINSON, J. This is an action to recover damages for a criminal prosecution of the plaintiff, instituted by the defendant, Mott, maliciously and without probable cause, as the plaintiff claims. The offense charged by the defendant's complaint in the criminal proceeding was the disposal of mortgaged personal property contrary to the provisions of our penal statute upon that subject. For the purposes of the present opinion, the following may be considered as facts occurring prior to the commencement of this action, and admitted or

supported by the evidence in this case: The plaintiff had executed to the defendant a mortgage upon two cattle to secure an indebtedness of twenty-five dollars, of which ten dollars was afterwards paid. The remainder of the debt being unpaid and due, the defendant, Mott, placed the mortgage in the hands of an attorney for enforcement. Two persons were, with the knowledge of Mott, twice sent to take the mortgaged property. There was evidence tending to prove that they could not find the property, and that they so reported to him; but it would also have justified the conclusion that they had no sufficient reason to believe that the property had been disposed of. The defendant sought to justify his conduct in instituting the criminal prosecution and arrest of the plaintiff by showing the information communicated to him by these agents. There was a verdict for the plaintiff for nine hundred dollars. This is an appeal from an order refusing a new trial.

At the trial the plaintiff was allowed to prove that when the constable executed the warrant of arrest, he said to the plaintiff that "if he did not pay the whole amount he would arrest him"; this language as to the amount probably referring to a sum larger than the debt then due, which the defendant's attorney had demanded as the amount of the mortgaged debt, with expenses incurred in sending for the property, besides attorney's fees. This evidence was subject to the objection made, and should not have been received. There was no evidence that the defendant had instructed or authorized the constable to make any demand, or to forbear making an arrest if payment should be made. The constable, in the discharge of the duty enjoined in his warrant, was acting as the officer of the law in a criminal proceeding. The defendant had no authority to control his action or to modify the command embodied in the warrant, and it is not to be presumed, without proof, that he assumed to do so. The erroneous evidence cannot be regarded as harmless. It bore directly upon the issue of malice, and may have affected the amount of the recovery.

The court instructed the jury, in effect, that the defendant, Mott, was chargeable with whatever knowledge his agents, who went after the property, may have had. This was a erroneous charge, as applied to the matters in issue in this case; and so the court below afterwards considered, although for other reasons a new trial was refused. The rule that the knowledge of an agent is legally imputable to the principal has no appli-

cation here, the issue being as to whether the defendant's prosecution was inspired by actual malice and without justifiable reasons. If the defendant's agents had actually known that the property had not been disposed of, the defendant would not have been liable in this action for malicious prosecution, if he instituted the prosecution in good faith and with due caution, believing that the offense had been committed, and acting upon grounds which justified that belief. Actual malice implies a wrongful purpose or intent in the mind of the person whose conduct is in question. It is not to be conclusively presumed or legally imputed to him merely because of the mental condition or the knowledge of another person, however related to him. The court below, however, considered that this error did not justify granting a new trial, for the reason that, as he considered, the undisputed evidence conclusively showed malice. Malice is a question of fact for the jury, and, as we think, while the case would have certainly justified the jury in the conclusion that the defendant's conduct was malicious, it did not so conclusively establish that fact as to have warranted the court in taking the question from the jury. Although the plaintiff told Mott that he still had the cattle, and tendered payment of the debt, it cannot be stated as a legal conclusion, from the whole case, that Mott did not believe that the offense charged had been committed, or that the information he had received did not justify such belief.

The evidence received as to the plaintiff's family seems to us to have been immaterial and irrelevant. No special damages to which such evidence could be relevant were pleaded. The fact that his wife was dead, and that he had four children to support, could not legitimately affect the amount of general damages to be awarded under the circumstances of this case.

The evidence as to the amount of property owned by the plaintiff was proper, as bearing upon the question whether the defendant had reasonable ground to believe that the plaintiff had disposed of the mortgaged property with intent to defraud, such intent being necessary to constitute a crime.

The refusal of the court to admit certain evidence, and to give a requested instruction, presents the question whether the mortgagee was entitled to hold and enforce the mortgage for the satisfaction of not only the debt, but the reasonable and necessary expense incurred in sending to take possession of the property (although it was not found), as well as the attorney's fee stipulated in the mortgage; and whether a tender

of the bare debt, after such expense had been incurred, was sufficient. The statute (Gen. Stats. 1878, c. 39, sec. 9) prescribes that redemption may be made from chattel mortgages by paying the sum due, and "all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage." In *Ferguson v. Hogan*, 25 Minn. 135, it was considered that a stipulation in a mortgage for the payment of the "expenses for the sale and keep of said property" was substantially equivalent to the statutory provision above referred to, and included the expense of taking the property. The mortgage now before us authorized the mortgagee, upon default, to take and hold or sell the mortgaged property, "retaining such amount as shall pay the aforesaid note, with interest thereon, and an attorney's fee of ten dollars, and such other expenses as may have been incurred, returning the surplus," etc. If the defendant had succeeded in finding and taking the property, he might have held and enforced his mortgage for the satisfaction of the debt, and of the necessary expense of such taking. The taking of the property is a proper step in the proceedings for the enforcement of the mortgage, and the proper expense of it is authorized, both by the statute and by the mortgage, to be charged as a sum to be satisfied under the mortgage; but, as we think, the expenses thus chargeable are not limited to such only as are incurred in such efforts to take the property as are immediately successful. And even if proper efforts to gain possession wholly fail without fault of the mortgagee, the expense is chargeable, so that the mortgagor cannot thereafter satisfy the obligation for which the mortgage is held and is enforceable by tendering payment of the bare debt without such expenses. If the efforts of the defendant to take the property were reasonable and necessary, as a means of availing himself of his right of possession, although his agents failed to get the property, the plaintiff could not avoid the effect of the mortgage lien by a tender which did not include that. Whether a personal obligation for the expenses was created against the mortgagor is another matter. But this we need not consider. The ten dollars stipulated as attorney's fee was intended to cover all the charges of an attorney in the foreclosure of the mortgage, and as it was never foreclosed, that sum was never chargeable. The first request to charge on the part of the defendant was erroneous. The charge of the court upon the subject was sufficient. The sixth request was also properly

refused, for the reason that it eliminates all questions as to the existence of probable cause.

Order reversed.

MALICIOUS PROSECUTION — MALICE A QUESTION OF FACT FOR THE JURY. — The fact of malice is a question for the jury: *Turner v. Walker*, 3 Gill & J. 377; 22 Am. Dec. 329.

EISENMENGER v. MURPHY.

[42 MINNESOTA, 84.]

JUDGMENT UPON DEFAULT AGAINST INFANT more than fourteen years of age, after personal service of summons upon him, but without the appointment of a guardian *ad litem*, is erroneous and voidable, but not void.

VOIDABLE JUDGMENT AGAINST INFANT — DUTY TO AVOID. — An infant with knowledge of an irregular and voidable judgment against him must move to avoid it within a reasonable time after attaining his majority; an unexcused delay of more than a year will bar his right.

R. A. Walsh, for the appellant.

S. P. Crosby, for the respondent.

DICKINSON, J. This is an appeal by Edward Murphy from an order of the district court refusing to set aside a judgment recovered against both of the above-named defendants in September, 1883. The judgment was entered upon default, after a personal service of the summons. This application of the appellant, made more than four years after the entry of the judgment, was based solely upon the fact alleged by him, and supported by other affidavits, that at the time of the entry of the judgment he was under the age of twenty-one years. It further appeared that he was engaged as a copartner with the other defendant, in the business of a retail meat market, in the city of St. Paul, under the firm name of Murphy Brothers. There were opposing affidavits bearing upon the question of the appellant's age. It further appeared that, more than a year prior to the making of this application to set aside the judgment, execution had been issued, and had been returned by the sheriff of Ramsey County unsatisfied. The affidavit of the appellant set forth that he was not aware of the existence of the judgment until "after" the issuing of that execution. The grounds upon which the court below based its refusal to set aside the judgment are not disclosed, but we deem it sustainable, even if it be accepted as a fact that the appellant was a minor at the date of the entry of the judgment,

and for these reasons: Upon the case presented upon this motion, it should be taken as a fact that the appellant had nearly attained his majority. The only claim on his part is, that he was not twenty-one years of age. It appears, further, that he was engaged in business on his own account; that he represented himself to be of full age; and, according to the affidavit of one person, made upon information and belief, whose statements were probably based upon his appearance, that he was of full age. The statute provides "that whenever an infant is a defendant he shall appear by guardian, to be appointed by the court in which the action is pending": Gen. Stats. 1878, c. 66, sec. 31. "Such guardian shall be appointed as follows: . . . When the infant is defendant, upon the application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons: Gen. Stats. 1878, c. 66, sec. 32. The manner in which the summons in an action shall be served is prescribed by statute. If the defendant is a minor under the age of fourteen years, it is to be delivered to him, and also to his father, mother, or guardian; or if there is none, then to any person having the care of such minor, or with whom he resides, or by whom he is employed. "In all other cases [than those before specified], to the defendant personally, or by leaving a copy," etc.: Gen. Stats. 1878, c. 66, sec. 59. From the sections of the statutes to which we have referred, it is apparent that the prescribed mode of acquiring jurisdiction over an infant fourteen years of age and upwards is by the service of the summons upon him, as in the case of adult defendants; but it is further required that he shall appear by guardian *ad litem*, who is to be appointed upon the application of the infant himself, if he makes such application "within twenty days after the service of the summons." Further provision is made, to be pursued in case the defendant neglects to make the application; and the court is further authorized, in section 31, to make such orders as may be necessary for the protection of the rights of an infant defendant. By the service of the summons upon this defendant the court acquired jurisdiction over him, and was authorized to proceed in the cause. It was error to proceed to judgment without the appointment of a guardian, but such irregularity did not affect the jurisdiction of the court. The judgment was voidable for that cause, but not void: *Simmons v. McKay*, 5 Bush, 25; *Hoover v. Kinsey Plow Co.*, 55 Iowa, 668; *Barber v. Graves*, 18 Vt. 290; *Porter v. Robinson*, 3 A. K.

Marsh. 253; 13 Am. Dec. 153; *Bloom v. Burdick*, 1 Hill, 130; 37 Am. Dec. 299; *Blake v. Douglass*, 27 Ind. 416; and see *Abdül v. Abdül*, 26 Ind. 287; Freeman on Judgments, secs. 151, 513. The judgment being erroneous only, and not void, it was incumbent on the defendant to move promptly to set it aside, or at least within a reasonable time after he became of age: *Jenkins v. Esterly*, 24 Wis. 340. His right to avoid a judgment would become barred by his own laches. The principle of the decision in *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798, is applicable here. The delay of more than a year after the defendant had notice of the judgment, he being then, as is to be assumed, several years past the age of majority, was such neglect on his own part as should preclude the granting of his motion so tardily made.

Order affirmed.

JUDGMENTS—INFANTS. — As to the validity and conclusiveness of judgments rendered against infants, see extended note to *Joyce v. McAvoy*, 89 Am. Dec. 185-193.

WILDNER v. FERGUSON.

[42 MINNESOTA, 112.]

GARNISHMENT—EXEMPTION AS LABORER. — If the occupation of the defendant debtor is shown, it is a question of law whether he is within the meaning of a statute exempting certain wages of a "laboring man or woman" from seizure.

GARNISHMENT—EXEMPTION AS LABORER. — An agent who sells goods by sample is not within the meaning of a statute exempting certain wages of "a laboring man or woman" from seizure. The statute refers only to those whose work is manual.

Noyes and McGee, for the appellant.

R. M. Day, for the respondent.

GILFILLAN, C. J. This is proceeding in garnishment, the debtor defendant appealing from the judgment of the court below against the garnishee defendant. The point made by appellant is, that the debt reached by the garnishment, being for wages due the appellant, was exempt, under the General Statutes of 1878, chapter 66, section 310, subdivision 11, as amended by the laws of 1879, chapter 5. After the court below had filed its decision, directing judgment for the plaintiff, the appellant requested it to find whether, at the times covered by the garnishment, the appellant was a laboring man,

within the meaning of subdivision 11, and thereupon the court found as a fact that he was. The appellant claims that that finding is conclusive upon the point. There are two reasons why it is not so: 1. That the statute regulating garnishments, as it allows judgment against the garnishee, on the disclosure alone, only when the full disclosure amounts to an admission of indebtedness, or of the possession or control of property, etc., of the defendant, does not contemplate a finding of facts as in ordinary actions. The disclosure is not the same as a trial of disputed facts in ordinary actions. Where issues are made on a supplemental complaint filed, and perhaps where a claim is made by a third person, a trial must be had as in a civil action; and if the trial is by the court, it ought probably to state its findings of fact as in ordinary actions. Where the decision of the court below is upon the disclosure alone, it is that we must look to, and not to the court's statement of facts. 2. Where the occupation of the defendant is shown, whether he comes within the meaning of subdivision 11 is a question of law, and not of fact.

The appellant was agent for the garnishee, selling its goods by sample, driving about for that purpose with his own horse and buggy, receiving a weekly salary. Subdivision 11 exempts "the wages of any laboring man or woman, or of his or her minor children, in any sum not exceeding twenty dollars, due for services rendered by him or them for any person for and during ninety days preceding the issue of process," etc. All men who earn compensation by labor or work of any kind, whether of the head or hands, including judges, lawyers, bankers, merchants, officers of corporations, and the like, are in some sense "laboring men." But they are not "laboring men," in the popular sense of the term, when used to refer to a man's employment, and that is the sense in which we must presume the legislature used the term. In *Wakefield v. Fargo*, 90 N. Y. 213, under an act making stockholders in a corporation liable for debts due "laborers, servants, and apprentices" for services performed for the corporation, the court construed the word "laborers" to refer to those whose services were manual or menial, — those who are responsible for no independent action, but who do a day's work or stated job under the direction of a superior, — and held that it did not include one who kept the accounts of receipts and disbursements, and, in the absence of the superintendent, had charge and control of the business. In *Jones v. Avery*, 50

Mich. 326, it was held that a traveling salesman, selling by sample, did not come within the meaning of a constitutional provision making stockholders of a corporation liable for "labor debts" of the corporation. There are many cases holding that contractors, consulting or assistant engineers, agents, superintendents, secretaries of corporations, and livery-stable keepers, do not come within the meaning of the term: *Powell v. Eldred*, 39 Mich. 552; *Aikin v. Wasson*, 24 N. Y. 482; *Short v. Medberry*, 29 Hun, 39; *Dean v. De Wolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Hun, 463; *Ericsson v. Brown*, 38 Barb. 390; *Coffin v. Reynolds*, 37 N. Y. 640; *Brusie v. Griffith*, 34 Cal. 302; 91 Am. Dec. 695; *Dove v. Nunan*, 62 Cal. 399. We do not think the legislature intended the exemption to operate in favor of any but those who are laboring men or women in the sense that their work is manual. Persons of that class usually look to the reward of a day's labor for immediate or present support, and such persons are more in need of the exemption than any others. This debtor defendant is not within that class.

Judgment affirmed.

GARNISHMENT — EXEMPTIONS. — As to who is a "laborer" within the meaning of the statutes exempting the wages of laborers, etc., from garnishment, see note to *Brown v. Hebard*, 91 Am. Dec. 419-421.

CANNON RIVER MANUFACTURERS' ASS'N v. ROGERS.

[42 MINNESOTA, 123.]

VENDOR AND VENDEE — COMPLIANCE WITH CONDITION OF ORAL CONTRACT OF SALE — TIME ESSENTIAL. — Where the vendee deposits the purchase price of land in bank under an oral agreement made at the time with the vendor that he shall receive it upon delivery by him to the bank of the instruments of title named in the conditions of deposit within a specified time, he is entitled to receive it only upon compliance with such conditions within such time. Time is of the essence of such contract, and it cannot be enforced upon compliance with the conditions named after the time specified.

JUDGMENT AS ESTOPPEL — DEFENSE CONDUCTED BY ONE NOT PARTY. — One not a party to the action cannot be estopped, nor claim an estoppel, against the plaintiff by the judgment, on the ground that he is the real party in interest, and conducted the defense, unless he did so openly, to the knowledge of the plaintiff, and for the defense of his own interests.

VENDOR AND VENDEE — ESTOPPEL — TITLE TO REAL ESTATE cannot be thrust upon a vendee by a deed which he is under no obligation to accept, and does not accept; nor can he be bound by a release which he justly refuses to accept.

ACTION to recover \$6,666.67, deposited by plaintiff in bank, to be paid to defendant on performance of the conditions stated in the opinion, and which sum, it was alleged, the bank had paid to him without such performance. Judgment for defendant, and plaintiff appeals.

Baxter, Townley, and Gale, for the appellant.

George W. Batchelder, for the respondents.

GILFILLAN, C. J. The plaintiff, on November 23, 1884, deposited in the First National Bank of Faribault \$6,666.67, to be paid to the defendant if he should, on or before March 15, 1885, deposit with said bank for plaintiff a good and sufficient warranty deed, conveying to plaintiff, free and clear of all encumbrance, two certain pieces of real estate, and also all tax certificates concerning the same, and also a duly certified copy of a resolution of the board of directors of the Wisconsin, Minnesota, and Pacific Railroad Company, releasing plaintiff from all and singular the covenants and obligations of each and every agreement between plaintiff and said company concerning the application of the proceeds of a certain land grant to plaintiff. The bank gave plaintiff a receipt for the money, showing the purpose and terms for and upon which it was deposited. March 7, 1885, defendant applied to the bank for payment of the money to him, offering to deposit with it a warranty deed conveying to plaintiff one of the pieces of real estate, he then having good title to the same; a warranty deed which he at the time supposed conveyed to plaintiff the other piece of real estate, but which did not describe it properly, he at that time not having good title to the piece of real estate intended to be conveyed,—which title he did not acquire till May 7, 1885; and also a resolution by the railroad company, not in the terms required by the conditions of said deposit with the bank; and also the tax certificates specified. The bank declined to pay the money to defendant without a surrender of its receipt, and one of plaintiff's directors, to whom the papers were handed, accompanied by defendant, went to plaintiff's secretary, who then had the receipt, but who was not authorized to accept the papers nor to deliver the receipt. On defendant's assurance that the papers were all right in compliance with the conditions of the deposit, and that if anything was wrong, he would make it right, the secretary took the papers, and delivered the receipt to said director, and he delivered it to the bank, and the bank paid

the money to defendant. Plaintiff afterwards sued the bank for wrongfully paying the money to defendant, and the latter recovered judgment. In that action, this defendant, apparently deeming himself the real defendant in interest, employed the attorney who defended the action, and took an active part in the management of the trial. Plaintiff had no notice of either of those facts. On the 18th of March, 1885, plaintiff's board of directors passed a resolution refusing to receive the papers, and directing its secretary to return them to the bank and demand a redelivery of the receipt, and appointed a committee who were authorized, in case they should find the papers not to be a compliance with the deposit, to demand of the bank repayment of the money to plaintiff. A copy of this resolution was immediately served on defendant. The papers were tendered back to the bank, but it refused to receive them. The defendant procured the railroad company to pass a resolution fully releasing plaintiff, as contemplated by the terms of the deposit, and on December 23, 1885, tendered it, with a sufficient deed from defendant to plaintiff of the piece of land misdescribed in its former deed, and of which he had not the title till May 7, 1885, to the attorney of the plaintiff in the action against the bank, who refused to receive them, and they were then deposited in court for the plaintiff.

We have stated the facts more in detail, perhaps, than was actually necessary for the decision of the case. The principles of law applicable are comparatively simple. Whether the defendant procured the payment of the money by the bank to him through willful false representations, or through a mistake of fact, is immaterial. He was not entitled to receive or retain it. He could be entitled to receive it only by complying with the conditions upon which it was deposited, which he did not do. The delivery by him to the bank of the instruments specified in the conditions of the deposit, within the time so specified, was the consideration upon which he would be entitled to receive the money. There is in the facts no pretense that he did it within the time, or that he was in condition, in respect to the title to the lands, to do it within the time. It is claimed that as he afterwards complied with the conditions, time was not essential, and reference is made to those cases where the time of performance by one of the parties to a contract affecting realty has been held not to be of the essence of the contract. Though it be conceded that he afterwards performed or offered

to perform on his part, such performance or offer not being accepted by the plaintiff, the doctrine of the cases referred to has no application. That doctrine applies only where there is a contract,—where the party asking to have it applied has contract rights which will be lost or forfeited if it be not applied. It is to avoid a forfeiture of such rights that courts act on the doctrine. Here there were no contract rights,—no contract. The deposit of the money was merely an offer which the defendant might accept or not, as he pleased. He was under no obligation to do anything. If he chose to accept, he could do so only by accepting according to its terms. No case can be found where the court permitted a party to acquire rights by treating the time expressed in such an offer for its acceptance as not essential,—as, in effect, not a part of the offer.

We have said there was no contract,—nothing but an offer,—because; although in a conversation between defendant and some of plaintiff's directors they informed him that plaintiff would give him \$6,666.67 for the lands and release, and he said he would accept and procure the release and make the conveyance, there was no corporate action (and that alone is to be looked to, and not conversations with or offers by its individual directors), except a resolution of the board of directors directing the treasurer to deposit the money to be paid to defendant, provided he should, on or before March 15th, deposit the specified instruments; and there was no agreement by him with the corporation. He took no action in reference to the subject of the resolution till he applied to the bank for the money.

The defendant has pleaded, and insists upon, as a bar to the action, the judgment in the action against the bank. That judgment is not a bar, for two reasons: 1. The parties are not the same; for if it be conceded that one not a party to an action may be estopped, or claim an estoppel, by the judgment, because he is the real party in interest and conducts the defense, yet he must do so openly, and to the knowledge of the other party, and for the defense of his own interests: *Schroeder v. Lahrman*, 26 Minn. 87. Whatever part defendant took in that case, it was not with the knowledge of the plaintiff. 2. The issues are not the same. In this action the contest is only upon defendant's right to receive and retain the money. In the action against the bank there was the additional issue, Was the bank guilty of negligence, as plaintiff's bailee, in paying the money to defendant? and it

was upon that issue that the judgment in favor of the bank was affirmed in this court. The tender of the instruments on December 23d to the plaintiff's attorney in the action against the bank, even if the defendant had a right then to make the tender, was ineffectual, for the attorney does not appear to have had any authority to receive them. But, as we have seen, defendant had no right to tender performance on his part—that is, to accept plaintiff's offer—after March 15th; and had the tender been made to any officer authorized to act for plaintiff in the premises, it would have been of no effect unless accepted.

And this brings us to defendant's claim that plaintiff received the whole consideration for the money. The facts found negative this claim. The offer of the various instruments to the bank, and an acceptance by it, would bind the plaintiff only in case they were in accordance with the terms of the deposit of the money. None would go into effect by reason of that tender, unless all were correct. Plaintiff was not obliged to receive a part acceptance of its offer, or the performance of anything less than the whole of its terms. Of the instruments tendered to the bank, two—the release and one of the conveyances—were not in accordance with plaintiff's offer. And on March 18th, plaintiff disavowed the action of the bank and of its secretary, and, in effect, closed or withdrew its offer, so far as it could. Neither the conveyances nor the release went into effect. They could not go into effect without the plaintiff's consent. The title to real estate cannot be thrust on one by a deed which he is under no obligation to accept, and does not accept. Nor can one be bound by a release which he refuses to accept.

It is also claimed that plaintiff has accepted a part of the benefits of what was done by defendant, and thereby ratified all that was done. It is true that if it had received and retained a part of what he tendered to the bank—as if it had accepted the deed that was good, or the lease—it could not afterwards repudiate what it had accepted, and recover the money from defendant, provided he was ready and willing, even after the 15th of March, to make good the remainder. It is claimed that plaintiff has accepted the benefits of the release. The railroad company's resolution of release offered to the bank was not such as plaintiff's offer contemplated; but it was, as the court below finds, passed for the purpose of releasing plaintiff from the obligations of all covenants and

agreements between plaintiff and the railroad company concerning the application of the proceeds of a certain land grant to plaintiff, and the court finds that the resolution "has always been acquiesced in by the railroad company." How it has been acquiesced in, whether by any act between it and plaintiff, or merely by omission as yet to attempt enforcement of such covenants and agreements, does not appear. Whatever the railroad company might do or omit to do, unless with the concurrence of plaintiff, could not affect the rights of the latter. The court also finds that since February 7, 1885, the date of the resolution, — a month prior to the day when defendant received the money from the bank, — the plaintiff has done no work, and made no expenditures as provided for in the agreements between it and the railroad company, but has expended the proceeds of the land grant, except the money involved in this action, and a few hundred dollars, otherwise than as in such agreements provided. If it failed to perform its agreements with the railroad company without being released, it may be liable to the railroad company for such failure; and if there were a doubt whether it had accepted or rejected the release contained in the resolution, its acts in respect to the subject-matters of the resolution might be evidence on the point. But it clearly appears from the findings that it steadily refused to accept the release, and it does not appear that its acts or omissions were because of the release, nor that it was understood between it and the railroad company that the release was operative.

Judgment reversed, and a new trial ordered.

VENDOR AND VENDEE — CONTRACT OF SALE — TIME OF THE ESSENCE OF THE CONTRACT. — Time is not of the essence of a contract for the sale of land: *Sanford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748; unless there are words clearly showing that to be the intention of the parties: *Taylor v. Baldwin*, 27 Ga. 438; 73 Am. Dec. 736; *Green v. Covillaud*, 10 Cal. 317; 70 Am. Dec. 725, and note.

JUDGMENT — ESTOPPEL. — As to who are concluded by a judgment, see note to *Gould v. Sternburg*, 15 Am. St. Rep. 142; note to *Lawrence v. Hunt*, 25 Am. Dec. 543, 544.

HAMMOND v. DIKE.

[42 MINNESOTA, 278.]

WILLS — EVIDENCE OF TESTAMENTARY CAPACITY. — Where a testator, after the commencement of his fatal illness, formally executes a codicil to his will, it is competent to prove, on the issue of testamentary capacity, that previously to such illness he was of sound and disposing mind and memory, and that prior thereto, and a week before his death, he expressed his intention and arranged to have the will changed in the way it was changed by the codicil.

WILLS — EVIDENCE OF TESTAMENTARY CAPACITY. — The nature and terms of a will are to be judicially regarded as an essential and important part of the evidence of testamentary capacity, and its consistency or inconsistency must also be regarded with relation to the situation, natural inclinations, and previously declared intentions of the testator. This rule is applicable in cases of doubtful capacity from death-bed sickness; and the declarations of the testator, especially if recent, and made when his mind was confessedly sound, are admissible to aid in determining whether the will is the product of a sane mind.

WITNESSES — IMPEACHMENT OF, BY DEPOSITIONS. — Depositions of witnesses taken before a trial are inadmissible to impeach the testimony of the same witnesses given at the trial, unless the proper foundation is first laid by directing the attention of the witnesses to the particular matters involved in the supposed contradiction, and giving them an opportunity to explain.

CONTEST to the codicil of a will. The proponent appeals from an order refusing to grant a new trial.

H. S. Gipson, for the appellant.

George W. Batchelder, for the respondents.

VANDEBURGH, J. This controversy arises over the codicil to the last will of William H. Dike, deceased, the validity of which is contested by the respondents, on the sole ground that at the time of its execution he was not of sound disposing mind and memory. By his will, which was made in 1886, he made the following disposition of the estate then possessed by him, viz.: "After my wife, Matilda M. Dike, has received what is secured to her by the laws of this state, all the rest and residue of my estate, real and personal, I give and bequeath, share and share alike, to Mary A. and M. Louise Hammond, daughters of John and Maria Hammond, of Essex County, New York." The codicil makes additional provision for his wife, and it is as follows: "I give and bequeath to my wife, Matilda M. Dike, two thirds of the judgment lately recovered by me against the state of Minnesota, on my old railroad claims, in addition to a life estate in our homestead,

and she shall have one third of all the rest and residue of the estate, the same as the law would give it if there were no will, and the rest shall go as in my last former will directed." It is affirmed by the verdict of the jury that the codicil was formally executed; that is to say, it was signed by the testator, and duly attested in his presence. And it is beyond controversy that, up to the Sunday preceding his death, he was of sound mind, and had sufficient testamentary capacity to dispose of his estate, by will or otherwise, though he was of the age of seventy-five years, and was suffering from a complication of diseases which had become chronic. His fatal illness began on Sunday night, and, commencing with severe pain, speedily resulted in great bodily weakness and prostration. He executed the codicil on Monday evening, and died the next morning. He was apparently in a state of unconsciousness most of the time during his sickness, believed by some of the medical witnesses to have been *coma*, caused by uremic poisoning, the result of kidney disease. But the evidence in behalf of the proponent tended to show that he could be aroused, and was conscious at intervals, and that he answered questions, recognized persons, including the attesting witnesses, and voluntarily gave directions in respect to his will; spoke of his own accord of the judgment which he had obtained; and in answer to a request made of him by his wife (the proponent), declined to give her certain property, and declared his purpose to adhere to his previously expressed intention to give the property spoken of by her to the contestants. There is a conflict between the medical experts as to the measure of consciousness and mental capacity which he may have had, or which would be compatible with his physical condition. One of them, called by the proponent, testified that he evidently understood his condition, and would be able to decide about such things as were suggested by the counsel, and "that it was not unusual in uremic conditions for patients to arouse to a sound mental condition."

After the class of evidence we have referred to had been introduced on behalf of the proponent, and in connection therewith, as a part of her case, her counsel offered to prove that the week before the testator died he had arranged to have his will changed in the way it was changed by the codicil, and his declarations on that subject; and also that on the Saturday previous to his death he informed one Lowell that he would like to come to his office to make a change in his

will, involving the disposition of two thirds or three fourths of the judgment referred to. This evidence was objected to by the contestants, and the court sustained the objection, on the ground that there was no question of undue influence in the case. It must be taken as a ruling upon the merits of the proposition. Had mere formal objections been made, they might have been obviated at the time. The question must therefore be deemed to be fairly raised as to the competency and materiality of such evidence on the issue of the testamentary capacity of the testator. We think the evidence was admissible on that issue. The question was, substantially, whether of his own free will the testator intended to make the testamentary disposition it is claimed he did make by his codicil, and whether he was able to and did comprehend the nature and effect of the transaction in its different bearings, including the subject-matter and the effect of the testamentary act upon his heirs and legatees named in the prior will: 1 Redfield on Wills, *130, notes. A testator may be of sound disposing mind and memory sufficient to sustain a will executed by him, though the state of his health and consequent mental condition may be unequal to business transactions of a more exacting nature; and his strength might hold out for the completion of a transaction involving but few details, and requiring his attention but a short time, while it would be insufficient for the disposition of a large estate under an elaborate will: *Kempsey v. McGinniss*, 21 Mich. 123; *Schouler on Wills*, sec. 32; *Sheldon v. Dow*, 1 Demarest, 508. Certainly, then, in determining the question of the capacity of the testator to understand the situation in which he stood in relation to the disposition of his estate, whether the subject was new or familiar to his thoughts, and what his previous intentions may have been, as shown by his acts or declarations, were important and material matters for the consideration of the jury. It is said by an eminent judge, in *Harrison v. Rowan*, 8 Wash. C. C. 580, 586, that "most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will; and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new." If, then, the testator, in this instance, contemplated a change in the terms of his will, in view of an accession to his property, and had manifested his purpose so to do a short time before his

sickness, these things would be material to be considered in determining whether he was able to understand, and did understand, the nature of the business in which he was engaged at the time he executed the codicil, and the scope and effect of the transaction: *Sloan v. Maxwell*, 3 N. J. Eq. 563, 572; *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 567; *Moore v. Moore*, 2 Bradf. 261. It is well settled that the nature and terms of the will itself are to be judicially regarded as an essential and important part of the evidence of testamentary capacity; and so, also, must be regarded its consistency or inconsistency with the situation, natural inclinations, and previously declared intentions of the testator: *Dinges v. Branson*, 14 W. Va. 103, 118; *In re Blakely's Will*, 48 Wis. 294, 301; *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648. And this rule is just as applicable in cases of doubtful capacity from death-bed sickness as from other causes: *Stewart v. Lispenard*, 26 Wend. 255, 313; *Irish v. Smith*, 8 Serg. & R. 573; 11 Am. Dec. 648. Such declarations, especially if recent, inform the jury of the state of mind of the testator when confessedly sound, and so aid in determining whether the instrument is the product of the same will: *Thornton v. Thornton*, 39 Vt. 122, 158; *Woodcock v. Johnson*, 36 Minn. 217. It was error, therefore, to exclude the evidence offered. In view of another trial, we express no opinion in respect to the character of the evidence or its sufficiency to justify the verdict.

In the probate court the evidence of several witnesses was reduced to writing *in extenso*, in the form of depositions, and signed by the witnesses. Some of these depositions were offered in evidence entire by proponent, to impeach the testimony of the same witnesses on the trial in the district court, but were rejected because the proper foundation had not been laid therefor by first directing the attention of the witnesses to the particular matters involved in the supposed contradiction, and giving them an opportunity to explain. The objection was well taken, and was properly sustained. The ruling of the court is in accordance with the settled rule of practice in this state.

Order reversed.

WILLS — TESTAMENTARY CAPACITY. — The will itself is the strongest proof of the testator's capacity, when it is made in conformity to a fixed determination previously expressed: *Couch v. Couch*, 7 Ala. 519; 42 Am. Dec. 602; and the reasonableness of the will is a circumstance in favor of the testator's capacity: *Tomkins v. Tomkins*, 1 Bail. 92; 19 Am. Dec. 656; and in like

manner the unreasonableness of the will is a circumstance against such capacity: *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402.

WILLS — DECLARATIONS OF TESTATOR. — As to the admissibility of the declarations of the testator to show testamentary capacity, see note to *Jackson v. Kniffen*, 3 Am. Dec. 397; note to *Roberts v. Trunick*, 52 Am. Dec. 167-169.

GREGORY v. CHRISTIAN.

[42 MINNESOTA, 304.]

VENDOR AND VENDEE — CONTRACT FOR SALE OF LAND — DUTY OF VENDOR TO MAKE DEED. — Where, under a contract for the sale of land, the vendor agrees to give a perfect deed upon compliance and demand by the vendee, the vendor must be prepared to have a complete title when the vendee, having complied on his part, demands a deed; and although entitled thereafter to a reasonable time in which to prepare and deliver the deed, the vendor is not entitled to a reasonable time in which to perfect a defect in the title.

VENDOR AND VENDEE. — **DEFECT IN TITLE** when the contract for the sale of land is made is no ground of objection thereto, if removed before the time fixed for completing the purchase.

VENDOR AND VENDEE — CONTRACT FOR SALE OF LAND — DUTY OF VENDOR TO MAKE DEED. — At law, the vendor must show a good title by the time appointed for the completion of a sale of land under a contract of sale, and the effect of a breach of the contract in this respect, upon compliance and demand for a deed by the vendee, is not avoided by the vendor's subsequent ability to comply, even before suit is brought.

C. H. Benton, for the appellant.

Brooks and Hendrix, and A. J. Shores, for the respondent.

COLLINS, J. March 23, 1887, defendant and one Laura A. Wilson made and entered into a written contract, whereby the latter sold and agreed to convey certain real property for the sum of five thousand dollars, of which five hundred dollars was paid down. The defendant was to pay the further sum of two thousand dollars, and to execute and deliver his note for the remainder (two thousand five hundred dollars), properly secured by mortgage, within ten days. Upon strict compliance with these terms as to payment and security, Mrs. Wilson, on her part, agreed, on demand thereafter, to convey the property to defendant, or his legal representative, by good and sufficient deed and in fee-simple. The next day defendant sold his interest in the contract for the sum of three thousand five hundred dollars to this plaintiff, transferring and delivering the same, with an assignment written thereon, as follows: —

"I, E. M. Christian, in consideration of thirty hundred dollars (\$3,000), to me in hand paid, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over to W. R. Gregory all my right, title, and interest in and to the foregoing contract, and the land therein described. Money to be refunded if title to said land proves to be not good.

"E. M. CHRISTIAN."

The plaintiff thereafter procured from Mrs. Wilson an extension of time within which to fulfill on his part, until April 12th. On that day, he tendered performance, and demanded a conveyance, as stipulated for. A deed, good in form, was tendered by Mrs. W., but plaintiff refused to accept it, alleging that her title was defective. Subsequently, he brought this action to recover the amount of money mentioned in the assignment, upon the ground that Mrs. Wilson's title to the premises was not good when she executed the contract of sale, and had not been made so up to the time of the commencement of the action. The alleged defects in the title were specifically set forth in plaintiff's complaint, all of which were put in issue by the answer. The latter pleading also contained an allegation that Mrs. W. had been the owner of the premises for many years, and that she had been and remained ready, willing, and able to convey the same, as stipulated in her contract. The plaintiff obtained a verdict, and from an order denying his motion for a new trial, defendant appeals.

The order must be affirmed. It stands admitted that when Mrs. Wilson entered into the contract, and at the time she offered to convey, she was not the owner of the property, although she supposed her title to be perfect. Further, and without considering plaintiff's contention that there are several defects in the deeds whereby Mrs. Wilson claims to have acquired title to the greater part of the property, it is undisputed that an outstanding adverse interest therein, held and owned by a person who did not attain her majority until February 6, 1888, was not secured by Mrs. W. until nearly thirteen months subsequent to the commencement of this action, just the week before its trial. When the defendant contracted with plaintiff to return the sum named as a consideration for the assignment if the vendor's title to the premises should prove not good, the title was confessedly imperfect, and so remained when plaintiff demanded and was entitled to a deed. This same state of affairs continued for

more than one year after plaintiff brought this action; in fact, the person in whom was vested the adverse interest had no legal capacity to convey until February 6, 1888. The plaintiff succeeded to defendant's rights under the contract of purchase, and, as the vendee, was bound to a prompt and strict performance of its conditions. It was incumbent on him to be ready with his money, and to be prepared to give his security, on the day named for the completion of the sale. By the express terms of the writing, he forfeited to the vendor all previous payments by failing to pay and secure at the appointed time. The obligation also rested upon the vendor to be prepared to have a complete title to the premises when the vendee, having complied on his part, demanded a deed. When such demand was made, she would be entitled, in law, to a reasonable time in which to prepare and deliver the conveyance, not reasonable time in which to perfect and make good a defect in her title: *Goetz v. Walters*, 34 Minn. 241; *Camp v. Morse*, 5 Denio, 161. Imperfections in the title when the contract of sale is made will prove no ground of objection thereto, if removed before the time fixed for completing the purchase: *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736. At law, the vendor must show a good title by the time appointed for the completion of the sale. The effect of a breach of a contract in this respect is not avoided by his subsequently becoming enabled to comply, even if it be before suit is brought: *Leake on Contracts*, 847. In conclusion, upon this point, it may be observed that the defendant herein, in his answer as well as upon the trial, relied upon the strictly legal defense of a perfect and complete title to the premises in Mrs. Wilson when she tendered her deed. If equities existed which might have excused her from strict and seasonable performance, the defendant failed to either plead or prove them. As the vendor was unable to give a good title when demand was made, as well as at the time when defendant entered into the contract to return a part of the money paid by plaintiff should her title prove defective, a right of action accrued immediately. This disposition of the case renders it unnecessary to consider a number of questions raised and argued by appellant, which have only served to complicate it.

Order affirmed.

VENDOR AND VENDEE — CONTRACT OF SALE — DUTY OF VENDOR TO MAKE DEED. — Under a contract of purchase, the vendee may compel the vendor

to make a conveyance of the legal title when the purchase-money is paid: *Burke v. Johnson*, 37 Kan. 337; 1 Am. St. Rep. 252; note to *Garrard v. Dollar*, 67 Am. Dec. 275.

VENDOR AND VENDEE — DEFECTIVE TITLE. — Equity will compel the vendee to take a defective title which becomes perfected at the time of the entry of the decree for specific performance: *Seymour v. Delancy*, 3 Cow. 445; 15 Am. Dec. 270; *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582.

FIRST NATIONAL BANK OF DEADWOOD v. GUSTIN MINERVA CONSOLIDATED MINING COMPANY.

[42 MINNESOTA, 327.]

CORPORATIONS — LIABILITY OF STOCKHOLDER — CONFLICT OF LAWS. — A stockholder in a corporation organized under the laws of another state contracts with reference to all the laws of that state which affect its organization or enter into its constitution. The extent of his individual liability as a share-holder to the creditors of the company is to be determined and enforced by the laws of that state, wherever necessary jurisdiction of the parties can be obtained, under the remedy provided by the laws of the forum.

CORPORATIONS — LIABILITY OF STOCKHOLDERS TO CREDITORS. — A creditor who deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid in money or property to the full amount of its par value deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the share-holders than the corporation could claim as part of its assets.

CORPORATIONS — LIABILITY OF STOCKHOLDERS TO CREDITORS. — Where a corporation, with which a creditor has dealt with knowledge that its nominal paid-up capital is not in fact paid, issues new shares after the claim of the creditor arises, he has no right to insist upon a contribution from the holders of these shares.

ACTION against the defendant corporation and certain of its stockholders. Judgment against the corporation, but in favor of the other defendants. Plaintiff appeals.

John B. and W. H. Sanborn, and G. E. Moody, for the appellant.

Warner and Lawrence, for the respondents.

MITCHELL, J. This action was brought upon a debt of the defendant company, a corporation organized under the laws of Dakota Territory, and against the other defendants, citizens of this state, as stockholders, to obtain judgment against the company for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to

satisfy the judgment against the corporation. To dispose of certain preliminary questions raised by the defendants, it may be stated at the outset that it is elementary law that where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all of the laws of the state under which the corporation is organized, and which enter into its constitution; and the extent of his individual liability as a share-holder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in this state, but because he has voluntarily agreed to the terms of the company's constitution. It is equally clear, upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The remedy, however, does not enter into the contract itself; and for this reason the individual liability of share-holders can only be enforced by the remedies provided by the laws of the forum. Hence the question of the liability of the defendant share-holders must be determined by the laws of Dakota, and that of remedy by the laws of Minnesota.

That the remedy resorted to by plaintiff in this case is a proper one is well settled: *Merchants' Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323. Upon the trial the judge considered it to be one triable by the court, but, on his own motion, submitted a specific question of fact to a jury; but subsequently, considering the verdict as immaterial, he proceeded without regard to it, and found the facts upon all the issues in the case. As neither party claims anything from this special finding of the jury, and as there is no exception which raises the question whether the action was triable by the court or by a jury, the whole case is reduced to the single question whether the conclusions of law are justified by the findings of fact.

Section 413 of the Civil Code of Dakota provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him." This is but declaratory of the common law.

The findings of fact, so far as here material, are, in substance, as follows: Prior to November 13, 1886, there had been organized, and were at that date in existence, under the laws

of Dakota, two mining corporations, viz., the Gustin Belt Gold Mining Company and the Minerva Mining Company, of the latter of which the plaintiff, a national banking association of Deadwood, Dakota, was a creditor. On the date named the defendant corporation was organized for the purpose and with intention of consolidating the other two companies, acquiring their property, and with the property so acquired carrying on a general mining business. "At the time of the organization of the defendant company, and as the scheme on which the same was based, it was agreed by the parties so incorporating, and by those representing and having authority to act for the two existing companies, that all the mines and mining property of such two corporations should, upon its organization, be transferred and conveyed to the new or defendant company, and constitute its entire capital stock and resources for the prosecution of its enterprise, and be represented in such organization by a nominal capital stock of two million five hundred thousand dollars, divided into two hundred and fifty thousand shares of ten dollars each, which should all be deemed and held as represented by the properties so conveyed to it; that fifty thousand of said shares should be issued to the former share-holders of each of the two old companies, and the remaining one hundred and fifty thousand shares belong to and constitute the working capital of the new corporation, and be sold under its authority, and on such terms as it should direct; and the proceeds of such sales constitute a fund to pay off the debts on the properties, and develop the mines thereon, and be used generally in the prosecution of the business of the new corporation, for the benefit of all its stockholders; that it was never expected or intended by such corporation, or by those to whom its stock was issued, that any subscription to the capital stock of the new company should ever be made, or that any capital stock should ever be taken, or any capital subscribed for or paid in, except by conveyance to it of the mining properties referred to, and the sale of the stock reserved for its working capital, in open market, for such sum as could be obtained therefor." This scheme was carried into effect by the conveyance to the new or defendant corporation of the properties of the two old corporations, and the issue to their stockholders, according to their respective holdings, of one hundred thousand shares of the stock of the new company (called in the findings "Old Company Stock") as paid-up stock, and by placing the remaining

one hundred and fifty thousand in charge of the board of directors, to be by them sold in the open market for such price per share (not less than fifty cents) as could be obtained therefor. The mining properties of the two old companies conveyed to the new company were not worth to exceed fifty thousand dollars cost, and were at the time of this scheme of consolidation considered and estimated as of the aggregate value of one hundred thousand dollars. The new and defendant company assumed payment of the indebtedness of the Minerva Mining Company to the plaintiff, which consented to a novation of its debt, accepting the notes of the defendant company in place of those of the old Minerva company. This is the claim upon which this action is brought. The court also finds "that the payees in said notes named, and the general managing officer of the plaintiff, well knew, at the time of the execution of said notes and of their indorsement and delivery to the plaintiff, all the facts hereinbefore stated, relating to the organization of the defendant corporation, and the understanding and plan of its organization, and so dealt with the defendant knowing such matters, and were parties to and interested in the original scheme of the incorporation of the defendant company as in the findings set forth." This must be construed as meaning that the "general managing officer" referred to is the person who transacted the business with the defendant company in taking these notes, and of the benefit of whose action in that regard the plaintiff has availed itself. Notice to him must be deemed notice to the plaintiff.

Returning, now, to the subsequent management of the affairs of the defendant company, the board of directors, pursuant to the scheme of organization, offered for sale in the open market the one hundred and fifty thousand shares remaining in the treasury as fully paid-up stock, and some of it was bought as such by the other defendants in good faith, for a price exceeding its fair market value, but not exceeding one dollar per share, believing it to be fully paid-up stock. This is called in the findings "treasury stock." The holders of the old company stock also placed their stock in the market, some of which the defendants also bought, under like circumstances, and in the same belief. In March, 1887, the board of directors, pursuant to a resolution adopted by them, distributed *pro rata* among the individual share-holders all the stock remaining unsold in the treasury. Of this the individual defendants received their respective shares, for which they paid nothing.

This is called in the findings "pro-rate stock." The court also finds that none of such defendants ever contracted, promised, or in any manner agreed, or intended to contract, promise, or agree, to pay, on account of such stock, any other or different or greater sum or consideration, unless the law would impose or imply such promise, contract, or agreement from the foregoing facts. The holdings of the defendants consist in part of old company stock, in part of treasury stock, and in part of pro-rate stock.

The contention of the plaintiff is, that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., nine dollars per share on the old company and treasury stock, for which they paid in value only one dollar per share, and ten dollars per share on the pro-rate stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid installments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear, from the facts, that the defendant company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold, or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that if shares are not in fact paid up, an arrangement between the corporation and the share-holders that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the share-holder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief: See *Phelan v. Hazard*, 5 Dill. 45; *Cook on Stocks*, sec. 47; *Scovill v. Thayer*, 105 U. S. 143.

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equi-

table consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist, the rule itself ceases to apply. This truth does not arise absolutely in every case in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that it would be his right, in any and every case, to inquire into the distribution of the capital among the share-holders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the share-holders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact. An illustration of this kind is to be found in the very first case in which what is now called the American doctrine was announced by Justice Story. We refer to the case of *Wood v. Dummer*, 3 Mason, 308, where a banking association distributed three fourths of its capital among its share-holders without providing for the payment of bill-holders, and the court impressed a trust in their favor upon the capital in the hands of the share-holders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid-up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff, as, for example, *Sawyer v. Hoag*, 17 Wall. 610; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the share-holders, it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases, no fraud, actual or constructive, has been committed on such creditors. If a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the share-holders than the corporation itself could claim as part of its assets: *Coit v. Gold Amalgamating Co.*, 119 U. S. 343. This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors.

These views effectually dispose of the question of the liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their pro-rate stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid

in, unless the mining properties of the two old companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors, whether represented by one hundred thousand shares or two hundred and fifty thousand shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on: 2 Morawetz on Private Corporations, secs. 832, 833.

Judgment affirmed.

CORPORATIONS — STOCKHOLDERS' LIABILITIES. — The liability of stockholders to creditors for corporate debts is discussed at length in a note to *Thompson v. Reno Savings Bank*, 3 Am. St. Rep. 806-873.

EARL v. GODLEY.

[42 MINNESOTA, 361.]

MARRIAGE BETWEEN INDIANS — LEGITIMACY OF CHILDREN. — Persons who belong to a tribe of Indians, and who are married and recognized as husband and wife by the custom and law of their tribe, must be treated as such by the courts, and their children regarded as legitimate, when the capability of the tribe to manage its own affairs, including its domestic relations, is recognized by the United States government.

ACTION to determine adverse claims to lands. The plaintiffs claim title through a deed from Jane Ortley, mother of Henry F. Ortley, Jr., the patentee. Defendants claim under a deed from Henry F. Ortley, Sen., the father of Henry F. Ortley, Jr. Defendants obtained judgment. A motion for a new trial was granted, and defendants appealed.

Eugene M. Wilson and Francis G. Burke, for the appellants.

R. H. McClelland and H. J. Peck, for the respondents.

VANDEBURGH, J. The only question presented by the record is, whether Henry F. Ortley, under whom defendants claim title, and Jane Ortley were husband and wife, so that the former, under the laws of inheritance and descent in this state, became entitled to the land in controversy as the heir at law of Henry F. Ortley, Jr., deceased, who was the patentee of the land, and is admitted to have been the child of the parties first named. It is denied by the respondents that Jane was the lawful wife of the first-named Henry Ortley. The

case was tried before a referee, who found for the defendants on the issue presented, and, among other facts, that the child Henry F. Ortly, Jr., was born in 1849, in what is now the town of Bloomington, Hennepin County, in this state, and that he died in the same place about the year 1859, and was a half-breed or mixed blood of the Sioux nation of Indians; that at the time of his birth his parents had been living and cohabiting together as husband and wife, and continued so to do, from about the year 1848, for the period of sixteen years, during which time several children were born unto them, including Henry, and during all this time they continued to reside in Bloomington with and among the tribe of Sioux Indians, and that they were married about the year 1848, in accordance with the usage and custom of the tribe with which they lived. And in respect to this Indian custom, it is found that among that Indian tribe there was a custom or law that any member of the tribe who desired to obtain a wife might purchase one, and the man and woman would thereupon, in accordance with such custom, live and cohabit together as husband and wife without other or further marriage ceremony; and that, in accordance with the usage and established custom prevailing among them, the parties might either of them also divorce themselves by dismissing or abandoning the other, without further ceremony, and thereupon either was at liberty to take another husband or wife; and that among the tribe referred to there was no other custom, law, or form of marriage. These parties must be deemed to be, as the referee found they were, husband and wife, under the custom and law of their tribe; and the sole remaining question is, whether such Indian marriages should be treated as valid, and the children of such marriages legitimate. The distinct tribal relations of these Indians were, during the time in question, still maintained, and they were recognized by the United States as a distinct political community: *United States v. Shanks*, 15 Minn. 302, 369. And where the tribal relation is still recognized by the government as existing, in its dealings with them, the fact that their primitive habits have been modified by their intercourse with the whites does not authorize a state to treat them as subject to its laws in respect to their relations and dealings with each other: *The Kansas Indians*, 5 Wall. 737. The general rule is, that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule

must be adopted in relation to these Indian marriages, where the tribal relation still exists. Under the laws of the United States they are recognized as capable of managing their own affairs, including their domestic relations, and those persons who were recognized by the Indian custom and law as married persons must be so treated by the courts, and their children cannot be regarded illegitimate: *Kobogum v. Jackson Iron Co.*, 76 Mich. 498, and cases cited; *Boyer v. Dively*, 58 Mo. 510; *Sutton v. Warren*, 10 Met. 451. The estate of Henry F. Ortle, Jr., therefore, was inherited by his father, and the defendants are the lawful owners of the land in controversy.

Order reversed, and case remanded, with directions to render judgment for the defendants upon the report of the referee.

MARRIAGE BETWEEN INDIANS. — A marriage between two Indians, entered into according to the customs and laws of their people, at a place where such customs and laws are in force, must be recognized as a valid marriage elsewhere: *Wall v. Williamson*, 8 Ala. 48.

WILLIAMS v. DAVENPORT.

[42 MINNESOTA, 393.]

LIBEL — **ACTIONABLE WORDS AGAINST ACTOR.** — Published words are actionable which directly tend to the prejudice or injury of any one in his office, profession, trade, or business, and which, if true, would render him unworthy of employment. Hence a publication falsely accusing a professional actor of ungentlemanly and discourteous conduct is libelous.

Davis and Farnam, for the appellant.

Allen and Shearer, for the respondent.

COLLINS, J. Action for a libel. The court below overruled a general demurrer to the complaint, and defendant appeals. The pleading demurred to set forth the alleged libel as having been written and published, by conspicuously posting up, in the following words and figures:—

“22d April.

“Miss Davenport wishes to thank those members of her company who so courteously and willingly received the half-week’s salary paid them last week. This was done solely upon the strength of very large railroad fares and excess baggage, and deeming it just to herself. The ungentlemanly and discourteous conduct of Mr. Lotto and Mr. Williams ne-

cessitated Miss Davenport consulting her lawyer how to act, who informed her, any one demanding full salary, it should be paid. Any member of the company who deem the other four nights due them will communicate the fact to Mr. Willard, and shall be paid. FANNY DAVENPORT."

It was further alleged that for many years the plaintiff had been an actor and member of the dramatic profession; that he was one of the defendant's dramatic company at the time of the publication; that courteous and gentlemanly conduct is especially necessary to the pursuit of his said calling, in securing and maintaining a position with the best dramatic companies; that the words in said publication, wherein reference was made to plaintiff and his conduct, were written and published of and concerning plaintiff in his professional character; that they were false and malicious; that the defendant wrote and published the same for the purpose of injuring, defaming, and wronging plaintiff in the pursuit of his profession; and that he had thereby been rendered odious, had been disgraced, and held up to the scorn, ridicule, and contempt of the members of his profession. Other circumstances as to the effect of the publication were stated in the pleading, but need not be specially mentioned here.

Without entering into a discussion of the many distinctions and refinements, impossible to harmonize, which have found a place in the text-books, as well as in the utterances of some of our courts, upon the subject of slander and libel, it may safely be asserted that published words are actionable which directly tend to the prejudice or injury of any one in his office, profession, trade, or business: Starkie on Slander, sec. 117. The injury consists in falsely and maliciously charging another with any matter in relation to his particular trade or vocation, which, if true, would render him unworthy of employment: 2 Kent's Com., 13th ed., 17.

The plaintiff claims that, by reason of the accusation, as detailed in his complaint, he has been "touched" in his calling and occupation, to his injury. The pleading contains the necessary averments, or colloquium of facts, showing that, under the circumstances accompanying the publication in question, it was libelous in fact. A good cause of action is stated, and the order stands affirmed.

LIBEL — ACTIONABLE WORDS. — Written or printed words which are injurious to a person in his office, profession, or calling are libelous: *Hayes v.*

Press Company, 127 Pa. St. 642; 14 Am. St. Rep. 874; *Missouri Pac. R'y Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105; *Hayner v. Cowden*, 27 Ohio St. 292; 22 Am. Rep. 303; *Obaugh v. Finn*, 4 Ark. 110; 37 Am. Dec. 773; *Williams v. Davenport*, 42 Minn. 395; *Dennis v. Johnson*, 42 Minn. 301.

HEDDERLY v. JOHNSON.

[42 MINNESOTA, 443.]

VENDOR AND VENDEE—MARKETABLE TITLE.—A vendee cannot be compelled to take an unmarketable title when he has stipulated for a good one. A title is unmarketable when there is reasonable doubt, in law or in fact, as to its validity. Such doubt, if raised upon a question of law, to be sufficient, must be one upon which the judicial mind would hesitate before deciding it; and if raised upon a question of fact, and there is no doubt as to how the fact is, and the proof is readily accessible to show how it is at any time, the title is not rendered doubtful by depending upon it.

VENDOR AND VENDEE—RESERVATION IN DEED—MARKETABLE TITLE.—A reservation by the grantor in a conveyance of real estate of a "strip of land one hundred and fifty feet wide, to be used by the said railroad company for a right of way or other railroad purposes, where the main line of its road, or any of its branches, as now located and constructed, or hereafter to be constructed, is laid or may pass over said premises," applies only to the location of the line of road as it exists at the time of the execution of the deed. If it is admitted that no line of railroad had then been located on the tract, there is no doubt of the validity of the grantee's title, and it is good and marketable.

ACTION to enforce special performance of a contract to convey land. Judgment for defendant, and appeal by plaintiff from an order refusing to grant a new trial.

Gilger and Harrison, for the appellant.

Davis, Kellogg, and Severance, and Samuel E. Hall, for the respondent.

GILFILLAN, C. J. This is an action to enforce specific performance of a contract to convey real estate, brought against the vendee of the particular tract as to which the questions here involved arise. The tract is described as section 11, town 126, range 43. The defendant resists performance of the contract on the ground that the plaintiff, the vendor, is not able to give him a good marketable title. The tract originally belonged to the first division of the St. Paul and Pacific Railroad Company, being a part of the land grant earned by it. The plaintiff derives his title through a deed conveying the

tract to one Wilson, made by the trustees of said railroad company, in which deed was this clause of reservation: "Reserving, however, a strip of land one hundred and fifty feet wide, to be used by the said railroad company for a right of way or other railroad purposes, where the main line of its road, or any of its branches, as now located and constructed, or hereafter to be constructed, is laid or may pass over said premises." This clause, it is claimed, makes the title unmarketable; and undoubtedly it does, if it makes an effectual, operative reservation of a right of way upon the land, or if it makes it reasonably doubtful whether the right of way does or does not exist. Courts will not compel a vendee to take an unmarketable title when he has stipulated for a good one; and a title is deemed unmarketable, within this rule, where, although it may be good, there is a reasonable doubt as to its validity. The term "reasonable doubt" is always used in this connection, because, as a doubt might be suggested or question raised as to most titles, it would go far to do away with the remedy by specific performance if a mere doubt raised, without regard to its character, were permitted to defeat the action.

A doubt as to the title may be raised upon a question of law or upon a question of fact, or upon both law and fact. It is impossible to state any precise and definite rule by which to determine when a doubt raised upon a question of law is to be deemed reasonable. Without going so far as some of the English cases, which appear to hold that in case where the doubt exists as to the construction of an act of Parliament, or of a deed or will, the court will resolve the doubt, and thus remove it, so that it shall not stand in the way of enforcing specific performance, we can at least say that the doubt suggested must raise a question of law that is fairly debatable,—one upon which the judicial mind would hesitate before deciding it. If it depend on the construction of an act of the legislature or of a written instrument, and the construction is readily arrived at by the application of the well-known rules of interpretation, it ought not to be regarded as making the title doubtful. The case of *Fairchild v. Marshall*, 42 Minn. 14, where the doubt was as to the duty of a widow to elect between the provisions in her behalf in her deceased husband's will, and the statutory provisions in her favor, is an instance in which the court held a doubt raised upon a question of law not to make the title unmarketable.

When the doubt as to the title is raised upon a matter of fact, the question whether it is reasonable or not will not depend solely on the actual existence or non-existence of the fact as it may appear after a trial of it. If it need a trial to ascertain it, and especially if its character be such, or if the evidence to show it be such, that it may be decided either way, or if the evidence be not readily accessible to the vendee so that he can establish the fact at any time when called upon, it would certainly affect the marketable value of the title. On the other hand, if there is no doubt as to how the fact is, and it may be readily and easily shown at any time, the title is not rendered doubtful by depending upon it. Thus where the title depends on the bar of the statute of limitations, and it clearly appears that the real owner is barred, it is a marketable title: *Pratt v. Eby*, 67 Pa. St. 396. In such case, the evidence to establish it must, from the nature of the fact, be easily accessible. An instance in which the fact, and the evidence by which it would have to be established, were of such a character as to render a title depending on the fact reasonably doubtful, is furnished by *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736.

To test this case by these general observations, we come to consider the clause of reservation. The defendant claims that it is an absolute, unconditional, and valid reservation to the railroad company of an easement for right of way or other railroad purposes over a strip 150 feet wide. The plaintiff claims that it is void for several reasons,—among them, that it does not describe nor locate the strip. And plaintiff also claims that it locates it along the line of the main or branch line of the railroad as then located, and that it makes the reservation depend on the fact of the main or branch line having been located on the tract, so that, if in fact no such line had been located, the reservation never took effect. The defendant refers to what was said by this court, upon a clause of reservation, in some respects similar to this, in the case of *Carlson v. Duluth Short Line R'y Co.*, 38 Minn. 305; and the court below seems to have considered that case as in effect deciding this to be a good reservation. There is, however, this marked difference between the two clauses, that in that case there was no reference in the clause to an already located line, but the easement was to be “where the line of any railroad is or may be laid over the premises,” clearly contemplating a future as well as existing location of the line. Bearing

in mind that if, when taken literally, the language is of doubtful meaning, or may have either of two meanings, that most favorable to the grantee in the deed must be adopted, it is very clear, beyond a reasonable doubt, that the intent was to reserve an easement along the line as then (now) located, whether the railroad was then or might thereafter be constructed upon it. The words "as now located" qualify the words "hereafter to be constructed," as well as the words "and constructed." Otherwise the word "located" must be understood so as to make the phrase mean as though it had been written, "or hereafter to be located and constructed." Of course the court could not make that insertion if it would give a different meaning, more favorable to the grantor than the clause would have without it. Construing it as intended to reserve an easement along the then located line, it has the elements of definiteness and precision, — means for determining when, and precisely where, the easement was reserved. Construing it as giving the railroad company the right to locate the easement by a subsequent location of the line would leave it in the nature of a "float," which, as it would be more onerous to the grantee than a definitely located easement, the court would avoid, if it could be done by a probable interpretation of the terms of the clause. This being the meaning of the clause, the reservation was operative and effectual only in case the line of the railroad had then been located upon the tract. Why the clause was inserted if the line had not been located on the tract can be matter only of conjecture. The deed furnishes no explanation, unless it may be inferred that the trustees who executed it had not then at hand means to ascertain whether the line as located crossed the tract, and that they inserted it as a matter of precaution.

The court below found as a fact that no line of railroad had been located on the tract, and that the main line, as located and constructed, passes at the distance of three hundred feet at the nearest point from the tract. In order that the title be free from doubt in respect to this easement, it is necessary, of course, that the fact be as found by the court, to wit, that no railroad line had been located on the tract. But, as we have already indicated, the existence or non-existence of the fact does not alone show the title free from doubt. How the fact is must also be free from reasonable doubt, and it must be capable of being easily and readily proved at any time when it may be necessary to prove it.

From the proceedings on the trial as shown by the settled case, it appears that the fact was not regarded as doubtful; for the defendant admitted that there had neither been the main nor any branch line located or constructed on the tract. From his ready admission of so important a fact, it must be concluded that it is manifest, and not disputable. And it would seem as though, from its nature, the evidence of it must be easily accessible; for even if it be conceded that it would be competent for the railroad company, in support of an easement under such a clause, to prove a mere paper location,—one made by merely making a line on its maps of the lands, instead of proving an actual location by something done on the land in the way of indicating the line,—it could hardly be difficult to get the proof that no such location, as to this tract, had been made. Strong presumptive evidence that no line had been located would be always at hand, in the fact that after so great a lapse of time as since the execution of this deed no line has been constructed, and that the line constructed is away from this tract. We do not, therefore, regard the question of law involved in the case, nor the fact on which the right of easement must depend, nor the evidence by which the fact must be shown, to be of such a character as to cast a reasonable doubt on plaintiff's title.

Order reversed.

VENDOR AND VENDEE—MARKETABLE TITLE.—What is a marketable title: *Moore v. Williams*, 115 N. Y. 586; 12 Am. St. Rep. 844; *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 635.

VENDOR AND VENDEE—MARKETABLE TITLE.—A purchaser need not accept an unmarketable title unless he has stipulated to take a defective title: *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634.

ANDERSON v. MINNEAPOLIS STREET RAILWAY Co.

[42 MINNESOTA, 490.]

STREET-RAILWAY'S LIABILITY FOR NEGLIGENCE, WHEN A QUESTION FOR JURY.

—It is the duty of a street-car driver, who also acts as conductor, and has exclusive charge of the car, to sit or stand where he can have such control of his team and car as is practicable. He must be in a place and condition to exercise a reasonable degree of care and diligence in watching and observing the street ahead of him, so as to prevent collisions, and avoid injury to pedestrians lawfully traveling thereon, whether children or adults; and in case of injury to a small child through his alleged negligence, it is for the jury to determine, under all the circumstances,

whether, had he been exercising due care and caution, he would have seen the child in season to have stopped the car, and thus have avoided the accident.

STREET-RAILWAY'S LIABILITY FOR NEGLIGENCE. — Although a street-car driver, who is also conductor, and has exclusive charge of the car, is performing his duty to his employer at the time of an accident in making change for a passenger at a time when he should have been watchful of the rights and careful of the safety of pedestrians, this fact will not relieve the employer of negligence when, had the driver's attention not been engrossed by the duty imposed by his employer, he could have avoided the accident. The duty which the car company and its employees owe to the public is paramount to that which they owe to each other.

PURPOSE AND MEANING OF CITY ORDINANCES cannot be extended by implication.

STREET-RAILWAY COMPANY'S LIABILITY FOR NEGLIGENCE — EVIDENCE. —

In an action against a street-car company to recover for injuries to a child, arising through defendant's alleged negligence, where it is shown that at the time of the accident the car causing it was under the exclusive control of a driver, who also acted as conductor, evidence is admissible to show that, at that time and previous thereto, cars upon that line were habitually crowded with passengers, as this suggests the duty, on the part of the company, to employ conductors to relieve the drivers, and thus avoid accidents.

Pierce, Arctander, and Nickell, for the appellant.

M. B. Koon, for the respondent.

COLLINS, J. This is an action to recover damages for the death of plaintiff's intestate, caused, as alleged, by defendant's negligence. When, upon the trial, all of the testimony had been submitted, the court directed and the jury returned a verdict for defendant. The appeal is from an order refusing a new trial.

Defendant is a corporation engaged in operating lines of horse-cars in the streets of Minneapolis. The deceased was plaintiff's son, aged about three years at the time of his death. The injuries from which he died were received upon one Sunday afternoon on Cedar Avenue, some 180 feet from the plaintiff's dwelling. It does not conclusively appear from the case, nor do we understand the respondent to claim it to so appear, that the parents had failed to exercise due care in regard to the child, or that it was on the avenue through their negligence at the time of the accident. One of defendant's cars, drawn by a pair of mules, was on the avenue, between Franklin Avenue and Twenty-second Street, going south. The car was well filled with passengers, the seating capacity being about thirty, and some stood upon the rear

platform. It was not the custom of defendant to employ conductors upon this line, and there was none upon the car in question. The driver, therefore, had exclusive charge, and in addition to looking after his team had to observe his passengers, see that they got on and off, open and shut the door for them, see that each person paid his fare and promptly register the same, to drop the fare as soon as deposited from the upper to the lower compartment of the box, and to make change for the passengers as occasion required. This was done from a cash-box fastened to the dash of the car, and which, as the driver stood, came a little above his knees. In making change, the driver, upon receiving the passenger's money, either from his hand or from the cup in the door,—but always from the rear,—had to examine it, open his cash-box, place the money in its proper place, select an envelope containing the requisite amount, close his box, and deliver the change to the passenger. This must have taken some little time, during which his attention was diverted from the business of driving, and his eyes necessarily taken off from his team, as well as from the street along which he was traveling. It could not have been done in an instant. He had to look to the rear twice, and to carefully observe his cash-box, which was upon the top of a low dash, and but a few inches from his knees. Just prior to the accident under consideration, a passenger had made his way to the front of the car, and handed a coin to the driver to be changed. The latter turned immediately to his cash-box, and commenced to get the change, the passenger standing in his rear, looking forward along the avenue. The testimony tended to show that at this moment the child was in plain sight, was seen by the passenger, about thirty feet south of the mules, running towards the car track, evidently frightened, and endeavoring to get out of the way of a pair of horses attached to a carriage, which were being driven rapidly along the avenue from the south,—that is, towards the car. As the carriage turned out to pass the car, the boy stood within a few inches of the rail. The mules were trotting slowly, and all of this time, according to the testimony of the passenger before mentioned, the driver was looking into his cash-box, for the purpose of making change. The passenger, excitedly, as he says, endeavored to get out on the driver's platform, but could not. He shouted to the driver about the time the mules were opposite the child. The former looked up, dropped the money

back into his box, seized the brake, and attempted to stop, but it was too late. The child was knocked down, and from a wheel of the car received the injuries which caused its death a few days later. The car could be stopped readily by the use of the brake, and was stopped within a very few feet from the point where the brake was first applied.

A case was here made out which should have been submitted to the jury, and the court erred in directing a verdict for the defendant. Unquestionably, so far as the public were concerned, it was the duty of the driver to sit or stand where he could have such control of his team and car as was practicable. He should have been in a place and in a condition to exercise a reasonable degree of care and vigilance in watching and observing the street ahead of him, so as to prevent collisions, and avoid injury to persons traveling thereon. The right of defendant to run its cars must be exercised with due regard for the rights of others, and with an appreciation of the knowledge that pedestrians, children as well as adults, may be lawfully upon our public ways. It will be observed from the foregoing statement that the testimony tended to show that, at a time when the driver was engaged in the performance of another duty than that of managing and controlling his team with due regard to the common enjoyment and common rights of the public in the street, — a duty imposed upon him by the defendant, and which, as the testimony indicates, occupied his attention to the exclusion of all other matters, — the child, apparently confused and trying to escape from approaching danger from another cause, made its appearance in close proximity to and running in the direction of the tracks over which defendant's car would soon pass. It was for the jury to say, from all of the circumstances, whether or not the driver, had he then been exercising due care and caution, would have seen the child in season to have stopped the car, and to have thus avoided the accident. The driver may have been performing his duty to defendant, when engaged in making change for a passenger, at a time when he should have been watchful of the rights and careful for the safety of others, but this fact does not absolve the defendant from the charge of negligence. The duty which it and its employees owe to the public is paramount to that which one may owe to the other.

In view of a new trial, it may be advisable to refer to one or

two of the rulings made by the court of which appellant complains.

1. The trial court did not err in its ruling upon the ordinance which plaintiff offered in evidence. The ordinance neither directed the defendant to employ conductors on its cars, nor did it prohibit the running of cars without conductors. Its object and office was to impose certain duties (many of which are required at common law) upon such conductors as defendant might employ. Its purpose and meaning cannot be extended by implication.

2. The plaintiff was not permitted to show that for some months previous, and at the time of the accident, the cars upon the Cedar Avenue line, especially upon Sunday afternoons, were crowded with passengers both ways; that this crowded condition covered the point where his child was injured; and that all along the line, and particularly at Franklin Avenue, many passengers got off and on. If the cars upon this line were habitually crowded with passengers, the defendant must be chargeable with notice of it, and also with knowledge that the attention of the drivers was thereby frequently distracted from the path of the car. It should suggest to defendant the necessity of employing conductors to relieve the drivers. The fact that it did not, under circumstances which seemed to require it, might well be considered by a jury in determining the question of defendant's negligence in a case like that at bar. The court erred in rejecting the evidence in question.

We have examined the balance of the alleged errors as to the admission of testimony, and see nothing to criticise in the rulings.

Order reversed.

STREET-RAILWAYS—DUTY TO CHILDREN ON STREET-CAR TRACK.—A street-railway company is bound to exercise the highest degree of diligence to discover and avoid injuring a young child upon its track: *Galveston etc. R. R. Co. v. Hewitt*, 67 Tex. 473; 60 Am. Rep. 32; and to the same effect substantially, see *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 475; *Baltimore etc. R'y Co. v. State*, 33 Md. 542, cited in a note to *Houston etc. R. R. Co. v. Symphons*, 38 Am. Rep. 639.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BARBER ASPHALT PAVING COMPANY v. HUNT.

[103 MISSOURI, 22.]

PASSAGE OF ORDINANCE UNDER ST. LOUIS CHARTER. — The provision of the charter of St. Louis requiring the presiding officer of each of the two houses of the municipal assembly to affix his signature to a bill in open session is mandatory; but other provisions thereof relating to mere matters of detail in the passing of ordinances are only directory, and it will be presumed that they were complied with, no objection being noted on the journal.

ORDINANCE VALID, THOUGH NOT RETURNED TO HOUSE WHERE IT ORIGINATED, WHEN. — Where both houses of the municipal assembly of St. Louis adjourned *sine die* on the day when an ordinance passed by them was presented to the mayor for his approval, such ordinance is not invalid because the mayor, after approving it, filed it in the city register's office instead of returning it to the house in which it originated.

WORK OF STREET PAVING COVERED BY PATENT, POWER OF CITY COUNCIL TO ORDER. — A city council may order a species of street work covered by letters patent to be done, notwithstanding the charter of the city requires the board of public improvements to "let out said work by contract to the lowest responsible bidder, subject to the approval of the council."

ACTION to enforce a lien. The opinion states the case.

C. M. Napton, for the appellant.

Hitchcock, Madill, and Finkelnberg, for the respondent.

SHERWOOD, J. This cause was tried without the intervention of a jury, and resulted in a judgment for the plaintiffs, enforcing the lien of certain tax-bills, and from this judgment the defendant appeals.

The grounds upon which the defendant resists the payment of the tax-bills in suit are two: 1. That the ordinances in

question were not passed and approved as required by the charter; and 2. That the work provided for in the ordinances was not let as provided in section 27, article 6, of the charter.

The charter provisions in respect to passing ordinances (article 3, section 22) are as follows: "No bill shall become an ordinance until the same shall have been signed by the presiding officer of each of the two houses, in open session; and before such officer shall affix his signature to any bill, *he shall suspend all other business, declare that such bill will now be read, and that if no objections be made, he will sign the same, to the end that it may become an ordinance. The bill shall then be read at length, and if no objection be made, he shall, in the presence of the house, in open session, and before any other business is entertained, affix his signature, which fact shall be noted on the journal, and the bill immediately sent to the other house*": 2 R. S. 1879, p. 1584.

Defendant put in evidence the journal of the house of delegates for March 20, 1883, which, after giving in full the report of the proper committee, that these two bills were truly enrolled, proceeds as follows: "The bills, as above, were read at length. No objection being made, Mr. Speaker Marriott, in the presence of the house, in open session, affixed his signature thereto, as required by the charter."

Upon this fact being thus shown by the journal, the defendant contends that two of the charter provisions, marked above in Italics, were not complied with, and therefore the ordinance passed is null. These provisions of the charter are copied from section 37, article 4, of our state constitution. And upon that section it has been ruled that a bill passed by the legislature became a law where the same was signed by the presiding officer of each of the two houses, in open session, that this provision was mandatory; but the other provisions, relating to mere matters of detail, were but directory, and as no objection was noted on the journal, the presumption would be indulged that the matters of detail were complied with; that the legislature proceeded by right, and not by wrong: *State v. Mead*, 71 Mo. 266. Here the journal expressly recites that the signature of the speaker of the house was affixed in open session. On the authority of the case cited, it must be ruled that the bills in question became ordinances, as against the objection already considered.

But it is urged that the bills failed to become laws, because never returned to the house in which they originated.

Section 23 of article 3 of the charter provides: "Every bill presented to the mayor, and returned within ten days to the house in which the same originated, with the approval of the mayor, shall become an ordinance."

The testimony shows the bills, though signed by the mayor, were not thus returned; both houses having adjourned March 27, 1883, *sine die*, the day on which the bills were presented to the mayor for his approval. But the testimony also shows that the mayor, on the same day, filed the bills in the city register's office on the day of their approval.

Section 28 of article 3 of the charter contemplates that cases will arise where a bill shall not have been returned to the house where the same originates; and besides, there is no provision in the charter that "no bill shall become an ordinance" which shall not be returned by the mayor to the house where the same originated. The same considerations, therefore, apply here as were applied in Mead's case. And we hold the ordinances valid as against this objection also.

Section 27 of article 6 provides how bids for work shall be awarded, to wit, that the board of public improvements shall "let out said work by contract to the lowest responsible bidder, subject to the approval of the council."

Upon this point, it is insisted that such provision was violated, because the work of street paving prescribed by the ordinances was covered by letters patent, under which plaintiff held the exclusive right, and therefore there was no competition for said work. This point, though adjudicated in other jurisdictions, is a case of first impression in this state. In New York it has been ruled, under a statute requiring all city work to be let "to the lowest bidder," that the common counsel were not prohibited from letting a contract for paving a street with material, or in a manner not admitting competitive bids or proposals: *In re Dugro*, 50 N. Y. 513. This ruling was approvingly followed in *Baird v. Mayor*, 96 N. Y. 567. Prior to the time the subject was discussed in New York, a similar ruling had been made in Michigan: *Hobart v. Detroit*, 17 Mich. 246; 97 Am. Dec. 185. These cases seem to us to rest upon the correct basis. It certainly was never intended that the city authorities should be unable to make a contract, however necessary to the public welfare such contract might be, if the article desired, or the manner of the performance of the contract, required the use of a patented article. Such a construction of the charter we regard as "sticking in the bark,"

and as subordinating the whole powers conferred on the common council to the meaning of two or three words contained in a single section of the charter. Besides, the rights of those interested are protected by the necessity of obtaining the approval of the council to any contract.

A different view of the matter under discussion has been taken in Wisconsin (*Dean v. Charlton*, 23 Wis. 590; 99 Am. Dec. 205), but by a divided court; and it is noteworthy that the legislature of that state did not approve the view of the statute taken by the court, and changed the statute, so as to prevent the continued prevalence of the objectionable ruling: *Mills v. Charlton*, 29 Wis. 400; 9 Am. Rep. 578; *Dean v. Borchsenius*, 30 Wis. 236.

For these reasons, we affirm the judgment.

ENACTMENT OF STATUTES. — It need not appear affirmatively from the journals of the two houses of the legislature that every act required to be done in the enactment of the law has been done: *People v. Dunn*, 80 Cal. 211. Where the constitution of the state prescribes a formal enacting clause to precede statutes, the provision is directory merely, and the omission of such clause does not invalidate a statute: *Cape Girardeau v. Riley*, 52 Mo. 424; 14 Am. Rep. 427; *contra*, *State v. Rogers*, 10 Nev. 250; 21 Am. Rep. 738.

ENACTMENT OF STATUTES. — As to the presumption in favor of the legal enactment of statutes, and the rebuttal of this presumption, see note to *People v. Starnes*, 85 Am. Dec. 357, 358. As to the signing and approval of bills by the executive, see note to *People v. Starnes*, 85 Am. Dec. 361, 362.

HANDLAN v. McMANUS.

[100 MISSOURI, 124.]

FINDINGS OF FACT BY TRIAL COURT BINDING ON APPELLATE COURT WHEN.

— In an action at law, tried by the court without the aid of a jury, the finding of facts by the trial judge is as binding upon the appellate court as a finding of facts by a jury; nor does it make any difference that the evidence was heard before one judge, and tried on a transcript thereof before another.

POSSESSION HELD UNDER LEASE OR LICENSE IS NOT ADVERSE, and cannot be of any avail as a defense under the statute of limitations.

POSSESSION UP TO GIVEN LINE, WHEN ADVERSE. — Where adjoining proprietors hold possession up to a given line, but without claiming or intending to claim beyond the true line, wherever that may turn out to be, the possession will not be adverse to the true owner; but where one takes and holds exclusive possession up to a wall or fence, and claims to be the owner up to that wall or fence, his possession will be adverse.

EJECTMENT. The opinion states the case.

Cunningham and Eliot, for the appellant.

D. D. Fassett and Sim T. Price, for the respondent.

BLACK, J. This is an action of ejectment for a strip of land three or four inches wide, on the north line of Locust Street, in the city of St. Louis, and extending north 104 feet, to the width of five inches, to an alley. The defense made and brought forward on the trial, by the instructions, is the statute of limitations.

On September 18, 1848, Henry Patterson, being the owner of fifty feet front, and extending back to the alley, conveyed the east half to Seth Ranlett, and on the same day he conveyed the west half to Charles Ranlett. The plaintiff derives title to the east half by mesne conveyance from Seth Ranlett, and the defendant to the west half from Charles Ranlett. The strip of land in dispute lies on the west line of the plaintiff's lot and is included in his deeds, and belongs to him, unless he and his grantors have lost it by adverse possession.

In 1852, one Rudolph was the owner of the west lot, and Seth Ranlett was still the owner of the east lot. Ranlett then had a brick house on his lot, extending back thirty-nine feet from the front line. Rudolph found just twenty-five feet of vacant land between Ranlett's west wall and a house west of his, Rudolph's, lot, and he took possession and excavated this twenty-five feet, and built a house thereon, extending from front to the alley. Rudolph inserted the beams of his house in Ranlett's west wall, and raised it one story, for which use he paid Ranlett a money consideration. He also built a wall from the north end of the Ranlett wall to the alley, placing the outside thereof on a line with the west face of the Ranlett wall. Thus matters stood until 1885, when the defendant, having become the owner of the west lot by the will of her husband, who acquired it in 1871, removed the old Rudolph house, and built a new one on the exact same land, placing the beams of the new house in the Ranlett wall as before. Beneath this wall, thirty-nine feet in length, and some five feet below the surface of the ground, was a footing course of stone a few inches thick, extending out from the wall so as to cover five or six inches. The defendant removed this projection when underpinning for her new house.

The case was tried before the court without a jury, and counsel for the plaintiff treat the case in this court as if we could make a finding of facts irrespective of the instructions

given by the trial court. In this they are in error. It makes no difference whatever that the case was tried by the court without the aid of a jury. The finding of facts is as binding upon this court in the one case as in the other, in an action at law like this. Nor does it make any difference that the evidence was heard before one judge and tried on a transcript thereof before another judge.

Under the instructions given, the court must have found that defendant and her grantors had actual, open, continuous, and exclusive possession of the strip of land in suit for a period of ten years before the commencement of this suit, and that the possession was not had or held under any license or permission from Seth Ranlett, but by virtue of a claim of exclusive ownership. And how could the finding have been otherwise? The disputed three or four inches, for a distance of thirty-nine feet from Locust Street back, had been on the inside of the defendant's house and the house of her grantors since 1852 or 1853, and the sixty-five feet in length of the strip in the rear had been covered by the wall erected by Rudolph since the last-mentioned date. This wall was a standing monument of a claim of absolute ownership never questioned by any one until this suit was brought. The circumstance that a few inches of the footing course of stone-work under the foundation wall of the Ranlett house projected out so as to cover the strip in suit for a distance back of thirty-nine feet is overcome by the fact that Rudolph took possession up to the Ranlett wall, and built his wall in the rear up to an extension of a line drawn along the face of the Ranlett wall.

There is no doubt but possession, to be of any avail as a defense under the statute of limitations, must be adverse, and not subordinate to the true title. The possession cannot be adverse so long as it is held under a lease or license, and it is an unquestioned fact that Rudolph acquired a right to rest the beams of his house in the west wall of Ranlett's house by license from the latter; but there is no direct evidence tending to show that this license related to or covered anything save the use of the wall itself. The direct evidence of Rudolph, and the circumstances in evidence, all tend to show that the license embraced nothing but the use of the wall. Besides this, the court found it to be a fact that when Rudolph procured and paid for the right to join onto the wall he did not know that this footing course extended out beyond the main foundation wall. The footing course seems to have been beneath the sur-

face of Rudolph's cellar. Certain it is, there is an abundance of evidence from which the court could, and did, find that the possession was adverse and hostile up to the wall of Ranlett's house at the surface of the ground, and that finding is conclusive, and takes these few inches covered by the projecting footings.

Where adjoining proprietors hold possession up to a given line, but without claiming or intending to claim beyond the true line, wherever that may turn out to be, the possession will not be adverse to the true owner. But where one takes and holds exclusive possession up to a wall or fence, and claims to be the owner up to that wall or fence, his possession will be adverse: *Cole v. Parker*, 70 Mo. 379. That the claim of ownership of Rudolph and those claiming under him included the strip in suit admits of no doubt, and it was open and notorious.

With the findings made by the trial court as shown by the instructions given, there is little to review in this case, and the judgment is affirmed.

ADVERSE POSSESSION, WHAT IS NOT.—When adjoining land-owners hold possession up to a dividing fence built for convenience, and without claiming or intending to claim beyond the true line, the possession of one is not adverse to the other: *Krider v. Millner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Schad v. Sharp*, 95 Mo. 574; *Russell v. Maloney*, 39 Vt. 579; 94 Am. Dec. 358; *Stinker v. Hauguma*, 99 Mo. 208.

O'BRIEN v. WESTERN STEEL COMPANY.

[100 MISSOURI, 182.]

ELEVATOR, EMPLOYEE RIDING IN, ASSUMES RISK OF CONSTRUCTION AND OPERATION WHEN.—An employee of defendant familiar with the construction and operation of its elevator used in its business only for transporting material, who rides thereon under an implied license, for his own pleasure and convenience, accepts whatever risk is incident to such construction and operation, and can only require of the defendant the use of ordinary care in its operation.

VARIANCE BETWEEN ALLEGATIONS AND PROOF.—Allegations of a petition charging death from a negligent defect in the construction of an elevator in which the deceased was riding at the time of the accident are not supported by proof of death resulting from negligence in its operation.

ACTION to recover damages. The opinion states the case.

T. B. Childress, for the appellant.

Cunningham and Eliot, for the respondent.

BRACE, J. This is an action to recover damages by a mother for the death of her minor son, William O'Brien, an employee of the defendant, who was killed in an elevator on defendant's premises. At the close of plaintiff's testimony, the court gave an instruction that the plaintiff could not recover. She thereupon took a nonsuit with leave; her motion to set aside the nonsuit having been overruled, and judgment rendered for the defendant, she appeals.

Plaintiff's cause of action is made to appear by the following averments, contained in her amended petition: "That on the fifth day of August, 1886, about eleven o'clock in the night-time, the said William O'Brien being in the employ of the defendant, as aforesaid, and being on said elevator descending from the fourth or top floor of said building to the first floor thereof, and the said elevator having descended nearly to the first or ground floor of said building, and having stopped for an instant, and the said William O'Brien having stepped to the front of said elevator to a position from which he could step therefrom to the ground or first floor so soon as said elevator should reach said first floor, and the person managing, operating, and running said elevator, not being able to see said William O'Brien on said elevator from where he was compelled to stand in order to manage and operate said elevator, owing to the negligent and improper construction thereof, and not knowing that said William O'Brien was standing on said elevator, near the front thereof, ready to step therefrom when it reached the first floor of said building, suddenly reversed said elevator, and started it upwards, and that said William O'Brien was then and there and thereby caught between the platform or floor of said elevator and the arch of the opening or entrance to said elevator, and was then and there so crushed and injured between the platform or floor of said elevator and the said arch that he died almost instantly therefrom; that the death of said William O'Brien was caused by the fault and negligence of the defendant in not having said elevator so constructed and arranged that the person employed to manage, operate, and run said elevator, whilst managing, operating, and running the same, could see onto the said elevator from the point where he had to stand when operating, managing, and running the same, and could see and know when any person was on said elevator when it reached the first or ground floor of said building and was near to the front of said elevator floor; all of which said defendant

might and would have had by the use of reasonable and ordinary care and diligence."

It does not appear from the pleadings or evidence when or by whom the elevator in question was constructed, or to whom it belonged; it only appears that at the time of the accident, and for some time prior thereto, the defendant was in possession of the premises, operating the elevator for the purposes of its business in transporting material (coke, coal, ore, iron, etc.) to and from the several floors of the building in which it was situate, and that for the purposes of this business it was not necessary that any person should be transported on it; that there were stairways in the building for the use of those who desired to go up or down from one floor to another, but that for some months previous to the employment of the plaintiff's son, and during the time of his employment, the elevator was frequently and continuously used by the defendant's employees in going from one floor to another. The elevator was a double one, having two cages, one going up as the other came down.

The cages were open platforms, and moved in a well or shaft inclosed by brick walls having arched openings on each floor, was operated by steam, and managed by the operator from the engine-room adjoining the shaft on the ground floor, by means of a crank. From his position at the crank, through a window in the wall he could see only a part of the platform of the cage on which the accident happened as it passed between the first and second floors; owing to obstructing machinery in the engine-room he could not see that part between the center of the platform and the front toward the arched opening of the first floor. About five weeks before the accident, William O'Brien, plaintiff's son, became an employee of defendant; his duties were, in connection with another employee, to unload rail-butts from trucks brought to his post, and which were thereafter, on buggies or barrows, wheeled to the hoist by other employees, and carried thereupon to their appropriate floor; with these butts, before they reached or after they were reloaded on the buggies, he had nothing to do; his post was outside the building, and his duties did not require him to enter the same or go upon the elevator. Before the accident he had frequently visited the engine-room, and had ridden upon the elevator.

At the time of the accident, the workmen on the several floors were, by an arrangement of their own, furnished with ice

to go into their water, at their own expense. The deceased and his comrade had made an arrangement for their ice-water with the workmen on the fourth floor. On the night of the accident the deceased and his comrade had separately gone to the fourth floor for a drink of water, as they had done for about a week before the accident. After getting their drink, they remained on the fourth floor about ten minutes, then entered the cage, gave the signal for lowering, and as they descended, the deceased stepped to the side and near the edge of the platform, next to the opening on the first floor, his comrade just behind him. When they had passed the arch of the opening on the first floor, the deceased leaned forward, projecting his head about three inches into the archway, preparing to step off when the cage should reach the ground floor. When the platform of the cage reached within about eighteen inches of the ground, however, its motion was suddenly reversed, the cage went up, catching the deceased's head between the platform and the arch, crushing it down on the platform, and inflicting injuries from which he directly died. The operator of the elevator, from his position at the crank in the engine-room, could not see the space on the platform of the cage occupied by the deceased and his companion at the time he reversed the motion; he says he did not know that anybody was on it, and reversed it because the other cage was wanted below. If the platform had descended to the level of the ground floor, as was the custom for it always to do before that time, that the deceased would have gotten off safely there can be no question.

He was on the elevator not as an employee of the defendant discharging duties within the scope of his employment, but, at best, under an implied license for his own pleasure and convenience; he was familiar with its construction and operation, and when he went upon it, accepted whatever risk there was incident to such construction and operation. It did not become the duty of the defendant to change either the one or the other by reason of the fact that the deceased and other employees of the defendant, for their own convenience, were impliedly permitted to ride upon it, such implication arising simply from the fact that they so used it without remonstrance. The only duty that such use could impose upon the defendant would be to operate its elevator in its business with ordinary care in view of such use; a failure to so operate it would be an act of negligence and a breach of duty, for the consequences of which the defendant may be held liable. The

petition, however, states no cause of action against the defendant for any act of negligence in operating the elevator, so that branch of the subject need not be further considered, so far as the rights and the duties of the parties in this action are concerned.

The act of negligence charged is in the plan upon which the elevator was constructed; and the important preliminary inquiry, What was the proximate cause of the death of the plaintiff's son? may obviate the necessity of any extended discussion of that plan, or its supposed connection with the injury. Obviously, two concurrent acts produced that death: the act of the deceased in placing himself in an attitude to step off the elevator, and the act of the operator in suddenly reversing its motion. Conceding that the evidence does not warrant an inference that the deceased was guilty of negligence in placing himself in the position he did at the time and under the circumstances, then, if his death was the result of any negligent act, it was that of the operator in reversing the motion of the elevator. And that negligent act was the proximate cause of his death. This act being the immediate cause of the injury complained of, if it was contributed to in any manner by the supposed defect in the plan of construction, that defect, at best, could only be a remote cause, and would not support plaintiff's action. There was in fact, however, no defect shown in the plan or the construction of the elevator to contribute to the death of plaintiff's son; it was safe and sufficient, not only for all the purposes of defendant's business, but for all the uses to which it was put by the defendant's employees if operated with ordinary care. The negligence, if any, that caused the death of the deceased was in the operation of the machine, and not in its plan or construction.

The allegations of the petition were wholly unsupported by the evidence, both as to the alleged act of negligence and as to the proximate cause of the death of William O'Brien, and at the close of plaintiff's case the court could not do otherwise than instruct that she could not recover, and there was no error in its refusal to set aside the nonsuit taken by reason of such instruction.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.—The servant assumes the risks of employment when he enters into it with a knowledge of those risks; and if he accepts employment on defective machinery, knowing it to be defective, the master will not be liable to him for any injury that he may receive from defects that were as well known to him as to the master: Note to *Buzzell v. Laconia Mfg. Co.*, 77 Am. Dec. 222, 223.

WEBER v. KANSAS CITY CABLE RAILWAY Co.

[100 MISSOURI, 194.]

RUNNING TRAINS AT SPEED PROHIBITED BY ORDINANCE NEGLIGENCE PER SE.

— A cable-railway company in running its trains through the streets of a city at a rate of speed prohibited by ordinance is guilty of negligence *per se*. And where a passenger, on alighting from a car of the company running at such prohibited rate of speed, is injured by a similar car running in the opposite direction, it cannot be said that the speed of the train had no direct agency in causing the injury.

CONTRIBUTORY NEGLIGENCE OF RAILWAY PASSENGER BARS RECOVERY.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence; and if his negligent act contributes to the bringing about of the injury, he cannot recover.

CONTRIBUTORY NEGLIGENCE IS ORDINARILY QUESTION OF FACT for the jury;

but if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his own witnesses, that he was guilty of negligence proximately contributing to produce the injury, it is the duty of the court to take the case from the jury.

QUESTION OF PLAINTIFF'S NEGLIGENCE SHOULD BE SUBMITTED TO JURY,

where the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions as to whether or not they establish want of care.

LEAVING CAR DOOR OPEN NOT INVITATION TO ALIGHT WHEN.

— The fact that the door of a railway car is left open and unguarded cannot be regarded as an invitation for a passenger to alight while the train is running at full speed. The fact that a train does not stop or check up is a warning to passengers not to get off.

JUMPING OR STEPPING FROM MOVING CAR CONTRIBUTORY NEGLIGENCE WHEN.

— Whether a party jumping or stepping from a moving car is guilty of negligence must depend upon other circumstances than the speed of the cars; but if the rate of speed is so high, and the place of descent so obviously perilous, that a person of ordinary prudence would not attempt to get off, the act is contributory negligence, and will bar a recovery.

DUTY OF RAILWAY COMPANY TO PASSENGERS GETTING ON AND OFF.

— It is the duty of a railway company to stop its cars and to let them remain at rest long enough for passengers to get on and off with safety, and its servants in charge of an approaching train must govern their conduct accordingly.

CONTRIBUTORY NEGLIGENCE, PARTY GUILTY OF, WHEN.

— Where a young man twenty years old, in the possession of his faculties, accustomed to cable-cars, knowing that they pass every few minutes, leaves his seat without signifying to the brakeman near him any desire to get off, and without any reason to believe that the cars would come to a halt, goes to the door of the car and jumps off while it is running at full speed, and is injured by an approaching train which he might have seen if he had looked for it, he is guilty of such contributory negligence as will bar a recovery.

DEFENDANT DOES NOT WAIVE HIS DEMURRER TO PLAINTIFF'S EVIDENCE

by putting in his own evidence; he thereby takes the chance of aiding the plaintiff's case, but is not deprived of his right to ask the court to direct a verdict on all the evidence.

SAVING OF EXCEPTIONS, WHAT SUFFICIENT. — A recital in a bill of exceptions that "said instructions, numbers 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, as asked, the court refused, to which refusal of the instructions thus asked the defendant by its counsel then and there excepted at the time," entitles the party so excepting to have each refused instruction considered in the supreme court.

GROUND ASSIGNED FOR NEW TRIAL, WHAT SUFFICIENT. — "A ground assigned for a new trial, that the court erred in refusing to give instructions numbers 10 to 22, inclusive, asked by the defendant," is sufficient.

DEMURRER TO EVIDENCE, PRACTICE OF SUPREME COURT ON. — When a demurrer to the plaintiff's evidence is made and overruled, and the defendant puts in his evidence, the supreme court in reviewing the ruling will do so in the light of all the evidence. If upon all the evidence, no matter by whom or when offered, there is a case to go to the jury, the ruling will not be reversed, though the demurrer to the plaintiff's evidence should have been sustained as the case stood when it was interposed.

ACTION to recover damages. The opinion states the case.

Johnson and Lucas, for the appellant.

Wash. Adams, for the respondent.

BLACK, J. The plaintiff recovered a verdict for thirteen thousand two hundred dollars, and on the suggestion of the trial court remitted a part, and accepted a judgment for ten thousand dollars, to reverse which the defendant appealed. The defendant, at the close of the plaintiff's evidence, submitted a demurrer to the evidence, and asked a like instruction at the close of all of the evidence, both of which were refused. These instructions present the question whether the court should have taken the case from the jury.

The facts disclosed by the plaintiff's evidence are, in substance, these: The defendant's road runs east and west through the city of Kansas. The cars run east on the south, and west on the north track; and when the trains pass, there is a space of not more than eighteen inches between the cars. The cars going east stopped only at the east and those going west at the west sidewalk crossings, and then only when persons desired to get on or off.

The plaintiff, a young man about twenty years old, boarded an east-bound train composed of a coach and grip-car, intending to go to Holmes Street. He took a seat on the north side of the grip-car, near the rear end. Besides end doors this car had two side doors at the rear end, one opening out on the north and the other on the south side. These doors were open, and there was no gate or other contrivance to prevent persons from going out on the north side.

Plaintiff testified that when he reached Holmes Street he pulled a cord, which was attached to an air-whistle, twice; that he heard no signal, and the cars did not stop; that he was looking out of the side windows of the car, and then leaned over and looked out of the front-end car door, and did not see any train coming from the east on the north track; that he then got up, went to the rear end of the car, and then stepped out of the north door, and just as he got upon the ground a train going west on the north track hit him and knocked him down. His legs were thrown under the wheels of the cars upon which he had been riding. The bones were broken, but amputation was not necessary; he is a cripple for life. He stepped off at or within a few feet of the east crossing. He says the train going west was so close to him when he got off that he could not see it. The whistle attached to the cord was in the grip-car, and was out of order, so that it gave no signal. The plaintiff's seat in the car was within six or eight feet of the gripman, and the plaintiff did not notify the conductor or gripman where he desired to leave the car; he had been in the habit of going back and forth to and from his work by way of the defendant's road, and was familiar with the running of the cars. There were eight trains on the road, and each made ten or twelve daily trips. These trains were running at the rate of a fraction over seven miles per hour, in violation of a city ordinance which limits the rate of speed to six miles per hour.

The evidence tends to show that it was the custom to ring the bells on both trains when and wherever they passed. The gripman of the train on which plaintiff took passage testified in positive terms that the bells on both trains were ringing at and before plaintiff stepped off. But the plaintiff testified, in answer to the question whether he heard any bells: "I don't remember of one on the car I was on. I never heard the bell on the approaching car." Another witness for the plaintiff, being asked if he was accustomed to hear signals, said: "Yes, sir. On that occasion I cannot say whether I noticed any."

The defendant offered evidence to the effect that there were notices in the cars warning persons not to get off while the cars were in motion. The defendant offered other evidence, but as it does not aid the plaintiff's case, it need not be recited.

The defendant, in running its trains at a rate of speed prohibited by ordinance, was guilty of negligence *per se*: *Keim v.*

Union Railway and Transit Co., 90 Mo. 314. Besides that, there is some evidence, though it is very weak, to the effect that the gripman on the west-bound train did not, as was the custom, ring the bell of his car when passing the east-bound train, upon which plaintiff was a passenger. We shall assume, for all present purposes, that this bell was not rung. It is argued for the defendant that the speed of the train had no direct agency in causing the injury; but we cannot yield a consent to the proposition. There was sufficient evidence of negligence on the part of the defendant. The important question is, whether the case should have been taken from the jury because of contributory negligence on the part of the plaintiff.

While carriers of passengers are held to a very high degree of care, there is a corresponding obligation on the part of the passenger to act with prudence; and if his negligent act contributes to bringing about the injury, he cannot recover. Ordinarily, as has been said by this court on several occasions, contributory negligence is a question of fact for the jury; but the power and the duty of the court to direct a verdict in proper cases cannot be questioned. As has been said, if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his witnesses, that he was guilty of negligence proximately contributing to produce the injury, it would be the duty of the court to take the case from the jury: *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219; 39 Am. Rep. 503. A demurrer to the evidence must be sustained, where an unavoidable inference of contributory negligence arises out of the plaintiff's own evidence, or out of other evidence which stands undisputed in the case: 2 Thompson on Trials, sec. 1680. But where the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions as to whether they establish want of care, the question of negligence on the part of the plaintiff should be submitted to the jury: *Petty v. Hannibal etc. R. R. Co.*, 88 Mo. 306.

The chief difficulty lies, not in the rule, but in its application; and here we may dispose of some preliminary questions. Much reliance is, by the plaintiff, placed upon the fact that the north door was open, and without a gate or other guard to prevent persons from getting off on the north track. Though it was warm weather, the fact that the door was left open and unguarded might be regarded as an invitation to alight from

that side when the car was employed in receiving and discharging passengers. But it was certainly no invitation for any one to jump off when the car was running at full speed. The very fact that the cars did not stop or check up was a warning to the passengers not to get off. In *McGee v. Missouri Pac. R'y Co.*, 92 Mo. 218, 1 Am. St. Rep. 706, the brakeman announced the station, and he and the conductor went out, taking their lights with them, and in the mean time the train stopped at a dangerous place. These facts, it was held, could be construed in no other light than a direction for the passengers to alight. The facts of that case are unlike the facts in the case at bar, as will be readily seen. The fact that the door was open cannot and ought not to be construed as any invitation to alight while the train was at full speed.

It was, in substance, said in *Doss v. Missouri etc. R. R. Co.*, 59 Mo. 27, 21 Am. Rep. 371, that to jump from a car propelled by steam, while in rapid motion, might be regarded as mere recklessness; but to step from a car at a platform while the motion of the car is slight may or may not be negligence, and the question is one for the jury. These observations have been quoted or cited with approval in subsequent cases: *Kelly v. Hannibal etc. R. R. Co.*, 70 Mo. 604; *Nelson v. Atlantic & Pac. R. R. Co.*, 68 Mo. 594; *Leslie v. Wabash etc. R'y Co.*, 88 Mo. 52. To jump from a horse-car while in rapid motion is not negligence *per se*: *Wyatt v. Citizens' R'y Co.*, 55 Mo. 487. In that case there was evidence tending to show that the conductor ordered the boy to get off. Whether a party jumping or stepping from a moving car is guilty of negligence must, it is manifest, depend upon other circumstances than the speed of the cars, and these circumstances are so variant that general rules only can be stated. If the rate of speed is so high, and the place of descent so obviously perilous, that a person of ordinary prudence would not attempt to get off, then the act is contributory negligence, and will bar a recovery: 2 Am. & Eng. Ency. of Law, 763.

Again, it is argued that the plaintiff was not bound look out for the approaching car, because, being a passenger, he had a right to assume that defendant would do nothing to put him in danger when alighting, and in that respect he stood on a different footing from a foot-man crossing the track; and in support of this we are cited to *Chicago City R. R. Co. v. Robinson*, 127 Ill. 9; 11 Am. St. Rep. 87. In that case, a boy six years old alighted from standing grip-cars on which he had

been a passenger, and was run over and killed when going over the sidewalk crossing at or near where he got off. It was held that the fact that he did not stop and look to see whether a train was approaching was not, as a matter of law, and without any regard to the surrounding circumstances, negligence; but the question of his negligence was one for the jury. If a failure to look for an approaching cable train in that case was evidence of negligence, then for much stronger reasons is the failure of the plaintiff in this case to look for an approaching train evidence of negligence.

Persons getting on and off of these cars are, while so doing, entitled to the protection due to passengers. The defendant is in duty bound to stop its cars and let them remain at rest long enough for persons to get on and alight with safety, and the servants in charge of an approaching train are in duty bound to govern their conduct accordingly. But there is nothing in this case to show that defendant was required to stop its trains at crossings when no one desired to get on or off. The train upon which plaintiff was a passenger being in full motion, the servants on the approaching train would not suspect that he or any one else would be in the act of getting off. We do not see that the plaintiff stands on any better footing than he would if he had jumped off at a place other than a crossing.

We have not said, nor do we now say, that the act of alighting when the cars was in full motion, taken by itself, or the failure of the plaintiff to look for approaching cars when he reached the car door, taken by itself, or any other single circumstance in the case, would be, as a matter of law, negligence. The undisputed evidence must be taken as a whole, and the conclusion must be drawn from the circumstances as a whole. We are not at liberty to consider them singly, and thus divide the case up into parcels.

It cannot be, and we believe it is not claimed, that the failure of the whistle to give an alarm afforded an excuse for leaving the car while in full motion.

Now, it is clear that the plaintiff was in possession of his faculties, and was accustomed to these cars, and must have known that they passed every few minutes. He left his seat without signifying any desire to get off to the brakeman, who was in close proximity to him, and without any reason to believe the cars would come to a halt. When at the door of the car, he could have seen the approaching train by casting an

eye east, for he then had an unobstructed view; but that he did not do so is clear. Under these circumstances, he stepped off while the cars were running at full speed, and was struck by the approaching cars as soon as he landed on the ground. With the other evidence resolved in favor of the plaintiff, and guided by what a prudent person would ordinarily do under such circumstances, it seems to us there can be but one conclusion, and that is, that the plaintiff was very negligent,—to express the result in mild terms. The conclusion of negligence is a necessary and unavoidable result. One cannot thus voluntarily place life and limb in peril, and claim to be free from fault. But for the plaintiff's negligence he would not have been injured. The court should have sustained the demurrer to the evidence.

The point made, that the defendant waived the demurrer to the evidence by putting in its own evidence is not well taken. The demurrer was not only interposed at the close of the plaintiff's evidence, but a like request was made at the close of all the evidence. The defendant, by putting in its evidence, took the chance of aiding the plaintiff's case; but it was not thereby deprived of the right to ask the court to direct a verdict on all of the evidence.

We see no reason for remanding this cause, and the judgment is simply reversed.

A FURTHER OPINION was written in response to a petition for a rehearing; but it did not involve the merits of the case, nor reconsider any of the points determined in the original opinion. It was devoted wholly to answering respondent's contention that exceptions were not properly saved by the appellant to the action of the circuit court in refusing instructions, and that defendant waived its objection to the action of the court in overruling the demurrer to plaintiff's evidence by putting in its own evidence. Upon these two topics the court said: "The argument is, that there is here but a general exception to the refused instructions as a whole, and if any one instruction was properly refused, the exception must fail. Authorities are cited from other states which favor the position taken by the respondent; but such is not, and never has been, the rule of practice in this state. Under our code of civil procedure, either party may, after the close of the evidence, move the court to give instructions, which are usually prepared by counsel, and must be in writing, and the practice is to number them, as was done in the present case. The refused instructions must be set out in the bill of exceptions, and a formula often used for saving the exceptions is, 'which instructions the court refused, to which refusal of the instructions thus prayed, the defendant, by his counsel, then and there excepted at the time': Whittlesey's Practice, 482. Such an exception entitles the party to have each refused instruction considered in this court. Whatever may be the ruling of other courts, we must follow the rule which has heretofore prevailed in this

court; and we see no reason to depart from it if we were at liberty to do so. This form of saving exceptions is quite as well understood as if the objector had said he excepted to the action of the court in refusing to give said instructions and each of them. There is nothing in *Harrison v. Bartlett*, 51 Mo. 170, or *City of St. Joseph v. Ensworth*, 65 Mo. 628, which conflicts with what has been said in this case. One of the grounds assigned for a new trial was, 'because the court erred in refusing to give instructions Nos. 10 to 22, inclusive, asked by the defendant.' This was sufficient. Again, counsel for the respondent are in error in supposing that the defendant waived its objection to the action of the court in overruling the demurrer to plaintiff's evidence by putting in its own evidence. When such a demurrer is made and overruled, and the defendant puts in its evidence, this court, in reviewing the ruling, will do so in the light of all of the evidence. If upon all the evidence, no matter by whom or when offered, there is a case to go to the jury, we do not reverse, though the demurrer to the plaintiff's evidence should have been given as the case stood when it was interposed. With these qualifications the demurrer to the plaintiff's evidence will be considered here, though the defendant should offer evidence after it is overruled: *McPherson v. St. Louis etc. R'y Co.*, 97 Mo. 254. The motion for rehearing is overruled."

RAILWAY COMPANIES — NEGLIGENCE. — A railway company is guilty of negligence *per se* when it runs its train through a city at a rate of speed prohibited by ordinance: *Peyton v. Texas etc. R'y Co.*, 41 La. Ann. 861; 17 Am. St. Rep. 430, and note.

CONTRIBUTORY NEGLIGENCE OF PASSENGER. — The law of contributory negligence as applicable to a passenger who jumps from a moving train is thoroughly discussed in the case of *Walker v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 795; 17 Am. St. Rep. 417, and more particularly in the extended note thereto, 422-429.

NEGLECTANCE IS A QUESTION OF FACT FOR THE JURY, and the court ought not to declare it, as a matter of law, unless there is a plain act of carelessness on the part of the plaintiff contributing to his injury: *Moakler v. Wilamette V. R'y Co.*, 18 Or. 189; 17 Am. St. Rep. 717, and note.

CARDER v. CULBERTSON.

[100 MISSOURI, 269.]

PROBATE COURT HAS NO JURISDICTION TO APPROVE SALE OF REAL ESTATE OF MINOR, made for less than three fourths of its appraised value; and a deed thereof showing that it was sold for less than three fourths of its appraised value is void on its face.

EJECTMENT. The opinion states the case.

J. W. Sebree and Prosser Ray, for the appellants.

Mirick and Young, for the respondent.

SHERWOOD, J. Ejectment for sixty acres of land in Carroll County. Plaintiffs were minors when this, their land, was sold for their education, in 1869, by their curator, under an order

made by the probate court for the sale of the land at public vendue. The land was appraised at one hundred and fifty dollars, and sold for ten dollars to Wm. H. Long; six years thereafter he sold by warranty deed to Andrew Hendricks for three thousand dollars. In April, 1884, Hendricks conveyed by like deed for same consideration to defendant.

By stipulation filed, it is agreed that the sole question to be determined is, whether the curator's deed is valid. There can be no hesitation on this point; it is a plain matter of statutory provision. Sections 28, 29, and 30, page 469, General Statutes, 1865, control this case.

The last-named section declares: "No real estate of any minor, sold under the provisions of this chapter, shall be sold for less than three fourths of its appraised value," etc. The probate court had no jurisdiction to approve such a sale. Its order of approval was therefore *coram non judice*, and the deed showing the facts already recited was void on its face.

We reverse the judgment, and remand the cause, with directions to enter a judgment for plaintiffs, after having taken an account of rents and profits.

JURISDICTION — STATUTORY AUTHORITY. — Where a statute prescribes the mode of acquiring jurisdiction, it must be strictly pursued, or all the proceedings will be mere nullities; Note to *Bloom v. Burdick*, 37 Am. Dec. 308, 309.

COTTRILL v. KRUM.

[100 MISSOURI, 397.]

MEANING OF ORDINARY WORDS IN INSTRUCTIONS NEED NOT BE EXPLAINED WHEN. — It is not necessary that the meaning of ordinary words and phrases, such as "diligent inquiry," used in their usual and conventional sense in instructions to the jury, should be defined or explained.

FALSE REPRESENTATIONS, DILIGENT INQUIRY NOT ESSENTIAL TO RECOVERY IN ACTION FOR. — In an action for false representations, it is error to instruct the jury that although the defendant made false representations as to material existent facts, calculated to affect the plaintiff's estimate of the value of property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if by diligent inquiry he might have discovered that such representations were false, then he cannot recover. And such an instruction is especially erroneous in a case where the evidence makes it apparent that the means of knowledge were not in fact equally available to the plaintiff and to the defendant.

WAIVER OF RIGHT TO SUE FOR FALSE REPRESENTATIONS, WHAT IS NOT. — A plaintiff does not waive his right to sue for damages for false repre-

sentations by offering, after the purchase of the property, to sell it at the price which the defendant represented to be its value, nor by allowing four or five months to elapse before bringing his suit.

SUBSTANTIAL MISDIRECTION OF JURY, GROUND FOR NEW TRIAL.—The supreme court cannot say that a judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion.

ACTION to recover damages. The opinion states the case.

C. H. Krum, for the appellant.

John C. Orrick, for the respondent.

BRACE, J. The plaintiff in this action seeks to recover damages for false representations alleged to have been made by the defendant in a trade in which the plaintiff, in exchange for fifty shares of paid-up stock in the Globe Panorama Company, sold and conveyed to the defendant a certain lot of ground in the city of St. Louis. The verdict was for the defendant, and from the judgment thereon in his favor the plaintiff appeals. Many grounds are assigned in the motion for a new trial, but the only one urged here why the court should have granted a new trial is, the alleged error of the court in giving the seventh instruction for the plaintiff, which is as follows: "7. If you find, from the evidence, that plaintiff, by diligent inquiry, might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then the court instructs you that he cannot recover in this action."

1. It is urged against this instruction that it is merely an abstract proposition of law, and does not define or explain to the jury what meaning the law gives to the expression "diligent inquiry," and is therefore erroneous; and in support of this contention, we are cited to many cases in which instructions were held to be erroneous, because legal propositions and the meaning of technical legal phrases or words were therein submitted to the jury; e. g., *Fugate v. Carter*, 6 Mo. 267, and *Anderson v. McPike*, 86 Mo. 293, in which the jury were called upon to determine what was "a material averment"; *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508, to define "malice"; *Boogher v. Neece*, 75 Mo. 383, in which the question of what was "adverse possession" and "color of title" was left to the jury; *Wiser v. Chesley*, 53 Mo. 547, what was "gross negligence"; and *Atteberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579,

in which it was left to the jury to determine the meaning to be applied to the words "in substance," in an action of slander. In all these cases, it will be observed, either a question of law or the meaning of certain words and terms to which a special and peculiar meaning had, by law, been applied, was left to the jury, and it was properly held that this was error. It is possible that cases might arise in which the words "diligent inquiry," might become the proper subject of judicial interpretation, but in this case it is evident they were used by the court and could have been understood by the jury in no other than in their usual, ordinary, and conventional sense, and such sense is presumed to be as well comprehended by the jury as the court, and needs no definition. It is not necessary that the meaning of ordinary words and phrases used in their usual and conventional sense should be explained in instructions.

2. It is further argued against said instruction, that it asserts an incorrect legal proposition, and ignores the difference between the situations of the parties in regard to the property concerning which the representations are alleged to have been made. The facts upon which the court, in its first instruction to the jury, authorized a finding for the plaintiff, were: "That if, at the time when the defendant traded to plaintiff the panorama stock in the petition described, defendant was, and from the opening of the enterprise had been, business manager of the Globe Panorama Company, and in charge of the business in St. Louis, and that, with a view to the trade of the stock aforesaid to the plaintiff, and as an inducement thereto, he stated to plaintiff, in substance, that the intrinsic and actual value of said panorama stock was one hundred dollars per share, and that none of said stock had been sold or could be bought for less than par, or one hundred dollars per share, and if he further stated, at the time and with the purpose aforesaid, that the actual cost price of the panorama property in St. Louis was seventy-five to eighty thousand dollars, and that from the opening of the business the company had been, and was still, doing a profitable business, and that from the time the business opened, the company had been earning and paying a dividend of two per cent or two dollars per share per month; and if you further find that said statements were untrue, that they were made for the purpose of deceiving and misleading plaintiff as to the true character or value of said stock; and if you find that plaintiff

traded the Pine Street lot for said stock on the faith of said representations, and that he would not have made the trade but for those statements and representations; and if you further find that the defendant, in making said representations, knew they were untrue, or if he made them as of his own knowledge, without knowing whether they were true or false, and with the intent of deceiving and misleading the plaintiff, — then the court instructs the jury that your verdict must be for the plaintiff."

The other instructions given, except the one under consideration, were in harmony with this one. There was evidence to support this instruction, and with the legal propositions, it asserts that no fault has been found. Nevertheless, the jury were told in the seventh instruction that although they should find all these facts to exist, yet if the plaintiff, by diligent inquiry, might have discovered that defendant's said representations were false, then he could not recover. In other words, the jury were told in this instruction that although the defendant made false representations as to material, existent facts, calculated to affect the plaintiff's estimate of the value of the property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if, by diligent inquiry, he might have discovered that such representations were false, then he could not recover.

We do not understand this to be the law. "It has indeed been laid down as a broad proposition of law that if the means of knowledge be at hand and equally available to both parties, and the subject of the transaction be open to the inspection of both alike, the injured party must avail himself of such means, if he would be heard to say that he was deceived by the representation of the other party, unless there was a warranty of the facts": Bigelow on Fraud, 522. This instruction cannot be maintained even upon the broad terms of this proposition; for by it the plaintiff is precluded from recovery if he could have discovered the truth by diligent inquiry, whether the means of knowledge were at hand, or whether they were equally available to him as to the defendant or not.

It may be well, however, to note the continuing remarks of Mr. Bigelow on the general proposition. He says, pages 523, et seq.: "But there is serious ground for doubting the correctness of this proposition in its broad form. It will be seen

upon reflection that the situation of the person to whom the misrepresentation was made is quite different in regard to means of knowledge from that of the person who made it. The latter may well be held to the duty to know the facts; no one has prevented him from knowing them. The former has been put off his guard and misled by the very representation which has been made. Indeed, a representation may as well mislead, even where the means of knowledge are directly at hand, as where they are not. The supposed rule in regard to means of knowledge came to be applied in this country before this distinction had been pointed out. . . . Recent authority has, however, gone far towards setting the matter right in principle; the proposition has now become very widely accepted, at law as well as in equity, at least as general doctrine, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him. . . . It may be improbable that a man with the truth in reach should accept a representation in regard to it; but the improbability can be no more than matter of fact. If the representation were of a character to induce action, and did induce it, that is enough. It matters not, it has been well declared, that a person misled may be said in some loose sense to have been negligent, . . . for it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or, 'You were yourself guilty of negligence.'" After citing many cases illustrative of the principle here stated, the learned author sums up thus, page 528: "The result appears to be, not only in principle, but by the weight of authority, that the party to whom the representation is made is affected by means of knowledge or by notice, only where the language or conduct was not of a kind to withdraw his attention from what otherwise he would be bound to know; i. e., only where the representation was not calculated to put him off his guard, as in cases of representations of value or opinion."

To use the language of another author: "The doctrine of notice has no application where a distinct representation has been made. A man to whom a particular and distinct representation has been made is entitled to rely on the representation, and need not make any further inquiry, although there are circumstances in the case from which an inference inconsistent with the representation might be drawn": Kerr on

Fraud, 80. "No man can complain that another has relied too implicitly on the truth of what he himself stated": Kerr on Fraud, 81. The same general principle has been expressed by this court in the following terms: "It is no excuse for, nor does it lie in the mouth of, the defendant, to aver that plaintiff might have discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying, 'You trusted me, therefore I had the right to betray you'": *Pomeroy v. Benton*, 57 Mo. 531. The same idea is expressed in another opinion, thus: "We doubt if it is equity to allow a sharper to insist on the fulfillment of his bargain on the ground that his victim was so destitute of sagacity as to make no further inquiries": *Wannell v. Kem*, 57 Mo. 478.

It is not seen how instruction No. 7 can be maintained without doing violence to the just and equitable principles announced in these authorities, even conceding that the parties at the time were upon an equal footing, and therefore to be treated as dealing at arm's-length; but when it is considered that the defendant was the originator and promoter of the enterprise, its business manager, fully conversant with every fact of its past history and present condition, having actual knowledge of the cost of the plant, the amount of the stock, and the dividend it was actually yielding, and that the plaintiff was a stranger to the enterprise, it becomes at once apparent that the means of knowledge were not in fact equally available to the plaintiff as to the defendant, and the instruction has nothing to stand upon; for "where the parties do not stand upon equal footing, the objection to a plea or claim of false representations that the party to whom they were made was 'negligent' in not making inquiry or examination has still less force, and would nowhere be allowed": *Bigelow on Fraud*, 534; *Wannell v. Kem*, 57 Mo. 478. So that in any view of the case this instruction must be condemned.

3. There is nothing in the contention that the plaintiff waived his right to sue for damages for false representations by reason of the fact that after the purchase of the stock, and before suit, he may have offered the stock for sale at par, or that four or five months elapsed between the time when he acquired the stock and the institution of his suit. Nor is it within the power of this court to say the judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law

bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion. For the error of the court in giving the seventh instruction, the judgment is reversed, and cause remanded for new trial.

ACTION TO RECOVER FOR FALSE REPRESENTATIONS.—An action for false representations, called also an action of or for deceit, may be maintained against a party who makes a false representation of a fact with knowledge of its falsity, to one who is ignorant of the falsity, with intent that it shall be acted upon, where the person to whom it is made acts upon it, and by so doing suffers injury: *Pasley v. Freeman*, 3 Term Rep. 51; *Taylor v. Ashton*, 11 Mees. & W. 401; *Ormrod v. Huth*, 14 Mees. & W. 651; *Peck v. Derry*, 59 L. T. N. S., 78; *Bigelow on Fraud*, 466; *Marshall v. Buchanan*, 35 Cal. 264; 95 Am. Dec. 95; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Mervin v. Arbuckle*, 81 Ill. 501; *Hiner v. Richter*, 51 Ill. 299; *Wheeler v. Ramtall*, 48 Ill. 182; *Keith v. Goldston*, 22 Ill. App. 457; *Stanhope v. Swafford*, 80 Iowa, 45; *Rhoda v. Annie*, 75 Me. 17; 46 Am. Rep. 354; *Buschman v. Codd*, 52 Md. 202; *McAleer v. Horsey*, 35 Md. 439; *Pendergast v. Reed*, 29 Md. 398; 96 Am. Dec. 539; *Litchfield v. Hutchinson*, 117 Mass. 195; *Medbury v. Watson*, 6 Met. 246; 39 Am. Dec. 726; *Bustard v. Farrington*, 36 Minn. 320; *Humphrey v. Merriam*, 32 Minn. 197; *Wilder v. De Cou*, 18 Minn. 470; *Cartwright v. Carpenter*, 7 How. (Miss.) 328; 40 Am. Dec. 66; *Schwenk v. Naylor*, 102 N. Y. 683; *Miller v. Barber*, 66 N. Y. 558; *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30; *White v. Merritt*, 7 N. Y. 352; 57 Am. Dec. 527; *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; *Benton v. Pratt*, 2 Wend. 385; 20 Am. Dec. 623; *Upton v. Vail*, 6 Johns. 181; 5 Am. Dec. 210; *Lum v. Shermer*, 93 N. C. 164; *Heater v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874; *Cox v. Highley*, 100 Pa. St. 249; *Routh v. Caron*, 64 Tex. 289; *Paddock v. Fletcher*, 42 Vt. 389.

In such an action the motive of the defendant in making the false representation is wholly immaterial. The law infers an improper motive, if what he says is false within his own knowledge, and occasions damage to the plaintiff: *Keith v. Goldston*, 22 Ill. App. 457; *Hiner v. Richter*, 51 Ill. 299.

BENEFIT TO PARTY MAKING FALSE REPRESENTATION NOT NECESSARY TO LIABILITY.—It is not necessary, in order to maintain an action to recover damages for a false representation, to show that the defendant was in any way benefited by the making of such representation, or that he was in collusion with some one else who was benefited: *Pasley v. Freeman*, 3 Term Rep. 51; *Hart v. Tallmadge*, 2 Day, 381; 2 Am. Dec. 105; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Fisher v. Mellen*, 103 Mass. 503; *Patten v. Gurney*, 17 Mass. 182; 9 Am. Dec. 141; *New York L. I. Co. v. Chapman*, 118 N. Y. 288; *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30; *Hubbard v. Briggs*, 31 N. Y. 518; *White v. Merritt*, 7 N. Y. 352; 57 Am. Dec. 527; *Upton v. Vail*, 6 Johns. 181; 5 Am. Dec. 210.

REPRESENTATION MUST BE FALSE AT TIME IT IS MADE.—In determining the question of the liability of the person making a representation, its truth or falsity must be ascertained by the fact as it was at the time when the representation was made. Any change in the condition of affairs that takes place after the time when the representation was made cannot affect the question of the liability of the person who made it: *Corbett v. Gilbert*, 24 Ga. 454; *Reeve v. Dennett*, 145 Mass. 23.

FALSE REPRESENTATIONS MAY BE BY ACTS AS WELL AS WORDS.—Such a fraud as will sustain the action for false representations may grow out of

actions as well as words. A party may make a false and fraudulent affirmation or representation by acts as well as by language: *Juman v. Toutmin*, 9 Ala. 662; 44 Am. Dec. 448; *Chisholm v. Gadsden*, 1 Strob. 220; 47 Am. Dec. 550; *Oroyle v. Moses*, 90 Pa. St. 250; 35 Am. Rep. 654; Bigelow on Fraud, 467.

SUPPRESSION OF THE TRUTH EQUIVALENT TO FALSE REPRESENTATION.—A false representation may consist in the suppression of the truth as well as in the assertion of a falsehood, and an action lies in either case if the intention to deceive exists and is the cause of the suppression or assertion: *Kidney v. Stoddard*, 7 Met. 252; *Allen v. Addington*, 7 Wend. 9; *Oroyle v. Moses*, 90 Pa. St. 250; 35 Am. Rep. 654.

OPINION, WHETHER CONSTITUTES LEGAL REPRESENTATION.—As a general rule, a false representation for which a party is liable to an action must be a representation of a fact, and not a mere expression of opinion. Generally speaking, an opinion does not constitute a legal representation. It is, perhaps, safe to say that a mere expression of an opinion is not sufficient to sustain an action for false representations: Bigelow on Fraud, 473; *Gordon v. Butler*, 105 U. S. 553; *Crown v. Carriger*, 66 Ala. 590; *East v. Worthington*, 88 Ala. 537; *Nowman v. Sutter County Land Co.*, 81 Cal. 1; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Tuck v. Downing*, 76 Ill. 71; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Sieveling v. Litsler*, 31 Ind. 13; *Bueckman v. Codd*, 52 Md. 202; *Belcher v. Costello*, 122 Mass. 189; *Haven v. Neal*, 43 Minn. 315; *Starr v. Bennett*, 5 Hill, 303; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Atina Ins. Co. v. Reed*, 33 Ohio St. 283; *Fulton v. Hood*, 34 Pa. St. 365; *Lyon v. Briggs*, 14 R. I. 222; 51 Am. Rep. 372. Bigelow, in his work on the law of fraud, page 473, says: "It is very difficult, however, to distinguish opinion from fact in cases lying along the border; so much so, that the courts will often be found in conflict with each other. Sometimes the same court will be found in conflict with itself." In the confusion which exists on this subject, it is difficult to formulate a rule that can be regarded as general. The proposition that no man is liable for the expression of his opinion or judgment cannot be accepted without qualification as universally true. It is true only when the opinion stands by itself, and is intended to be taken as distinct from anything else. If a party positively affirms an opinion upon a matter of fact susceptible of actual knowledge in such a manner that the person to whom he makes the statement, instead of being put upon inquiry is put off his guard, and the latter, relying upon such statement, is injured, an action will lie: Bigelow on Fraud, 475; *Hickey v. Morrell*, 102 N. Y. 454; 55 Am. Rep. 824. Danforth, J., in delivering the opinion of the court in that case, said: "So as to every representation concerning a matter of fact by which one man is induced to change his position to his injury or the benefit of another. It may be so expressed as to bind the person making it to its truth, whether it take the form of an opinion or not": See *Teachout v. Van Hoesen*, 76 Iowa, 113; 14 Am. St. Rep. 206.

REPRESENTATIONS BY VENDOR AS TO VALUE OF PROPERTY.—Representations as to the value of property, made by a vendor thereof to the vendee, are ordinarily regarded as mere statements of opinion, and the party to whom they are made is not generally justified in relying upon them. Such representations, though false, are not usually sufficient to sustain an action for false representations: *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572; *Sieveling v. Litsler*, 31 Ind. 13; *Hunter v. McLaughlin*, 43 Ind. 38; *McAker v. Horesey*, 35 Md. 459; *Medbury v. Watson*, 6 Met. 259; 39 Am. Dec. 728; *Kimball v. Bangs*, 144 Mass. 821; *Bristol v. Braidwood*, 28 Mich. 191; *Haven v. Neal*, 43 Minn. 315; *Walker v. Mobile etc. R. R. Co.*, 34 Miss. 245; *Anderson v. Mo-*

Pike, 86 Mo. 293; *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314; *Simar v. Canaday*, 53 N. Y. 298; 13 Am. Rep. 523; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166. In *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379, Grover, J., delivering the opinion of the court, said: "Upon the question of value, the purchaser must rely upon his own judgment; and it is his folly to rely upon the representation of the vendor in that respect." In *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523, it was held that the question whether a representation as to value is merely the expression of an opinion or an affirmation of fact is a question for the jury. And in *Haven v. Neal*, 43 Minn. 315, it was held that such representations are admissible in evidence when connected with and serving to characterize other material statements. But if the buyer is induced by the seller not to make inquiries as to the value in regard to any extrinsic facts affecting the quality or value of the property, he may rely upon the assurance of the seller; and if he does so rely, and such assurances are fraudulently made to induce him to buy, he may have an action for the injury he sustains: *Hanger v. Evans*, 38 Ark. 334; *Nysewander v. Lowman*, 124 Ind. 584; *Parker v. Moulton*, 114 Mass. 99; 19 Am. Rep. 315; *Bradbury v. Haines*, 60 N. H. 123; *Stewart v. Stearns*, 63 N. H. 99; 56 Am. Rep. 496; *Weidner v. Phillips*, 39 Hun, 1; *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379.

If the value of property sold can be known only to an expert, and the seller, representing himself as knowing its value, makes false representations in reference thereto, which are relied on and acted upon by the buyer to his injury, an action for damages will lie: *Hanger v. Evans*, 38 Ark. 334; *Allen v. Hart*, 72 Ill. 104; *Teachout v. Van Hoesen*, 76 Iowa, 113; 14 Am. St. Rep. 206; *McKee v. Eaton*, 26 Kan. 226; *Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515.

Some authorities hold that a false and fraudulent statement as to the number of acres in a tract or piece of land sold is actionable: *Starbweather v. Benjamin*, 32 Mich. 305; *Coon v. Atwell*, 46 N. H. 510; *Whitney v. Allaire*, 1 N. Y. 305; *Bardsley v. Duntley*, 69 N. Y. 577; *Hill v. Brower*, 76 N. C. 124. But see *contra*, *Gordon v. Parmelee*, 2 Allen, 212; *Mooney v. Miller*, 102 Mass. 217; *Oredle v. Swindell*, 63 N. C. 305. In *Lewis v. Jewell*, 151 Mass. 345, however, it was held that a seller of certain carpets laid upon various floors, halls, and stairs of a large dwelling-house was liable to the buyer for false representations as to the number of yards, and that the latter was not bound to ascertain, by measurement or otherwise, the number of yards he was buying. It was stated in that case that the rule as to land adopted in that state did not extend to such a case. In Iowa, it is held that a buyer may rely upon the representations of the seller as to ownership of real property, its location, and the like; and in order to recover for false representations in reference to such matters, it is not necessary for the plaintiff to show that he instituted inquiry by consulting plats or records, or by employing a surveyor, or the like: *McGibbons v. Wilder*, 78 Iowa, 531; *Carmichael v. Vand-bur*, 50 Iowa, 651; *Hale v. Philbrick*, 42 Iowa, 81. And the same doctrine seems to prevail in Indiana also: *Leadbetter v. Davis*, 121 Ind. 119; *West v. Wright*, 98 Ind. 335; *Campbell v. Franken*, 65 Ind. 591.

In some states it is held that false representations made by a vendor of real estate as to the price which he paid for it are not actionable: *Holbrook v. Connor*, 60 Me. 578; 11 Am. Rep. 212; *Bishop v. Small*, 63 Me. 12; *Medbury v. Watson*, 6 Met. 246; *Hemmer v. Cooper*, 8 Allen, 334; *Mooney v. Miller*, 102 Mass. 217; *Cooper v. Lovering*, 106 Mass. 77. But in other states the contrary doctrine is held: *Ives v. Carter*, 24 Conn. 392; *Green v. Bryant*,

2 Ga. 66; *McAker v. Horsy*, 35 Md. 439; *Van Epps v. Harrison*, 5 Hill, 63; *Sandford v. Handy*, 23 Wend. 260.

In the case of *Kenner v. Harding*, 85 Ill. 264, 28 Am. Rep. 615, it was proved that the defendant represented to the plaintiff that he had been offered a certain sum for the land he was selling him, and fraudulently induced the person who, he said, had made him the offer to corroborate his statement. The plaintiff, relying on the statement and its corroboration, bought the land, paying for it much more than it was worth. Judgment was rendered in favor of the plaintiff. Scholfeld, J., who delivered the opinion of the court, affirming the judgment of the lower court, said: "The general rule of law is, that the mere statements of the vendor as to the value of land, or what he has been offered by others for it, are not of themselves such evidence of legal fraud as will authorize a recovery; but that does not apply here, where the statement comes from a third party, unknown to have any interest in magnifying the value of the land. The plaintiff, being himself uninformed as to the value of the land, was entitled to expect that he could get honest information from others, and was not to anticipate they were in a conspiracy with the defendant to deceive him. By this conspiracy the defendant caused a source of information to which the plaintiff had a right to resort, and on which to rely, to become corrupted, and thereby prevented his obtaining correct information, and so the plaintiff was both morally and legally defrauded." It is well settled that false representations as to the character and pecuniary standing of a third person, made with knowledge of their falsity, and with intent to deceive, to one who, relying upon them, is thereby injured, will sustain an action. This subject is discussed in the note to *Lord v. Colley*, 25 Am. Dec. 447-451; and see *Bigelow on Fraud*, 481; *Endsley v. Johns*, 120 Ill. 469; 60 Am. Rep. 572. In the following states, however, statutes have been enacted requiring representations concerning the credit of another to be in writing, in order to bind the party making them: Alabama, California, Idaho, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, South Carolina, Vermont, Virginia, West Virginia, and Wyoming.

On the question whether a purchaser of property is liable to an action for deceit for misrepresenting his own financial ability, the authorities are divided. In Vermont, it is held that an action for deceit will not lie against one who makes a false representation of his own pecuniary resources in order to obtain, and thereby obtains, a credit for goods sold him: *Fisher v. Brown*, 1 Tyler, 387; 4 Am. Dec. 726; *Dyer v. Tilton*, 23 Vt. 313; *Jude v. Woodburn*, 27 Vt. 416; *Best v. Smith*, 54 Vt. 617. And in *Lyon v. Briggs*, 14 R. I. 222, 51 Am. Rep. 372, it was decided that the action will not lie against one obtaining credit by fraudulently representing that he is "a person safely to be trusted and given credit to." *Bigelow*, on the other hand, says: "The matter of one's own solvency is a fact capable of actual knowledge and there is no good reason for holding a representation concerning it to be of less effect than a representation concerning the solvency of a third person." And see *Cain v. Dickenson*, 60 N. H. 371.

PROMISE IS NOT REPRESENTATION. — It is well settled that a promise to perform an act, although accompanied at the time with an intention not to perform it, is not such a representation as can be made the basis of an action for false representations. Strictly speaking, a promise is not a representation: *Lawrence v. Gayetty*, 78 Cal. 126; 12 Am. St. Rep. 29; *Gage v. Lewis*, 68 Ill. 604; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Burt v. Bowles*, 69 Ind. 1; *Long v. Woodman*, 58 Me. 49; *Dave v. Morris*, 149 Mass. 188; 14 Am. St.

Rep. 404; *Knowlton v. Keenan*, 146 Mass. 86; 4 Am. St. Rep. 282; *Gallager v. Brunel*, 6 Cow. 347; *Lexon v. Julian*, 21 Hun, 577; *Furrar v. Bridges*, 8 Humph. 566; *Fenwick v. Grimes*, 5 Oranch C. C. 439.

MISREPRESENTATIONS OF LAW NOT GROUND OF ACTION. — Generally speaking, a misrepresentation of law affords no basis for an action of deceit; *Bigelow on Fraud*, 487; *Upton v. Tribilcock*, 91 U. S. 45; *Jordan v. Pickett*, 78 Ala. 331; *Lehman v. Shackleford*, 50 Ala. 437; *Beall v. McGehee*, 57 Ala. 438; *Townsend v. Cowles*, 31 Ala. 428; *Fish v. Cleland*, 33 Ill. 243; *Burt v. Bowles*, 69 Ind. 1; *Russell v. Branham*, 8 Blackf. 277; *Reed v. Sidener*, 32 Ind. 373; *Carter v. Harden*, 78 Me. 528; *Thompson v. Phenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Grant v. Grant*, 56 Me. 573; *Burns v. Lane*, 138 Mass. 350; *Jagge v. Winslow*, 30 Minn. 363; *Lexon v. Julian*, 21 Hun, 577; *Etina Ins. Co. v. Reed*, 33 Ohio St. 283; *Gormely v. Gymnastic Ass'n*, 55 Wis. 350.

REPRESENTATION MUST BE OF MATERIAL FACT. — A false representation, to be the ground of an action for deceit, must be of a material fact; *Bigelow on Fraud*, 497; *Jordan v. Pickett*, 78 Ala. 331; *McGar v. Williams*, 26 Ala. 469; 62 Am. Dec. 739; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Schwabacker v. Riddle*, 99 Ill. 343; *People v. Healey*, 128 Ill. 9; 15 Am. St. Rep. 90; *Ward v. Lunen*, 25 Ill. App. 160; *Dave v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404; *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25; *Hall v. Johnson*, 41 Mich. 286; *Lebby v. Ahrens*, 26 S. C. 275. In delivering the opinion of the court in *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25, Morton, C. J., said: "In order to maintain an action of tort for deceit, it is necessary for the plaintiff to show that the false representations alleged in his declaration are representations of material facts calculated to deceive him and induce him to act. Representations as to matters which are merely collateral, and do not constitute essential elements of the contract into which the plaintiff is induced to enter, are not sufficient."

NOT NECESSARY THAT IT SHOULD HAVE BEEN SOLE INDUCEMENT. — It is not necessary, however, that the false representation should have been the sole inducement to the contract. A person who has by misrepresentation induced another to enter into a contract will not generally be heard to deny the materiality; and if the party deceived can show that the misrepresentation had a substantial effect in inducing the contract, it will be sufficient; *Jordan v. Pickett*, 78 Ala. 331; *Winter v. Bandel*, 30 Ark. 362; *Hale v. Philbrick*, 47 Iowa, 217; *Safford v. Grout*, 120 Mass. 20; *Fishback v. Miller*, 15 Nev. 428; *Addington v. Allen*, 11 Wend. 374; *Lebby v. Ahrens*, 26 S. C. 275; *James v. Hodaden*, 47 Vt. 127.

REPRESENTATIONS MUST BE MADE WITH KNOWLEDGE OF THEIR FALSITY. — To make a party liable in an action at law for false representations, it must be shown that he made the representations with actual knowledge of their falsity, or without knowing whether they were true or false, or under such circumstances that he ought to have known that they were false, whether he did or not; *Bigelow on Fraud*, 509; *Joliffe v. Baker*, L. R. 11 Q. B. D. 255; *Reese River Mg. Co. v. Smith*, L. R. 4 H. L. 64; *Bartholomew v. Bushnell*, 20 Conn. 271; 52 Am. Dec. 333; *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90; *Schwabacker v. Riddle*, 99 Ill. 343; *Tone v. Wilson*, 81 Ill. 529; *Walker v. Hough*, 59 Ill. 375; *Hiner v. Richter*, 51 Ill. 299; *Mitchell v. Deeds*, 49 Ill. 416; *Phelps v. James*, 79 Iowa, 262; *Allison v. Jack*, 76 Iowa, 205; *McKown v. Furgason*, 47 Iowa, 636; *Campbell v. Hillman*, 15 B. Mon. 506; 61 Am. Dec. 195; *Kingsbury v.*

Taylor, 29 Mo. 508; 50 Am. Dec. 607; *Lamm v. Port Deposit Ass'n*, 49 Md. 233; 33 Am. Rep. 246; *Bowker v. Delong*, 141 Mass. 315; *Ole v. Cassidy*, 138 Mass. 437; 52 Am. Rep. 284; *Emerson v. Brigham*, 10 Mass. 197; 6 Am. Dec. 109; *Tryon v. Whitmarsh*, 1 Met. 1; 35 Am. Dec. 239; *Stone v. Denny*, 4 Met. 151; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551; *Grinwood v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Hexter v. East*, 125 Pa. St. 52; 11 Am. St. Rep. 874; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Cox v. Higley*, 100 Pa. St. 249; *Fulton v. Hood*, 34 Pa. St. 365; 75 Am. Dec. 664; *Staines v. Shore*, 16 Pa. St. 200; 55 Am. Dec. 492; *Jackson v. Stockbridge*, 29 Tex. 394; 94 Am. Dec. 290.

The law raises no presumption of knowledge on the part of the party making the representation from the mere fact that the representation is false. If he honestly believed it to be true at the time he made it, he cannot be held liable in this form of action: *Lord v. Goddard*, 18 How. 196; *Schwabacker v. Riddle*, 99 Ill. 343; *Holdom v. Ayer*, 110 Ill. 448; *Avery v. Chapman*, 62 Iowa, 144; *Hartford Ins. Co. v. Matthews*, 102 Mass. 221; *Sollund v. Johnson*, 27 Minn. 455; *Sims v. Eiland*, 57 Miss. 83; *Cowley v. Smyth*, 46 N. J. L. 388; 50 Am. Rep. 432; *Stitt v. Little*, 63 N. Y. 427; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; 51 Am. Rep. 508; *Crown v. Brown*, 30 Vt. 707. But one who makes a representation without knowing whether it is true or false is, in morals and in law, as blamable as if he made it knowing it to be false. If, therefore, a party states as of his own knowledge material facts susceptible of knowledge, which are false, he is guilty of a fraud which renders him liable to the person who relies and acts upon his representations as true, and it is no defense that he believed the representations to be true: *Bigelow on Fraud*, 513; *Juan v. Toulmin*, 9 Ala. 662; 44 Am. Dec. 448; *Munroe v. Pritchett*, 16 Ala. 785; 50 Am. Dec. 203; *Binstein v. Marshall*, 58 Ala. 153; 25 Am. Rep. 729; *Hanger v. Evans*, 38 Ark. 334; *Mayer v. Salazar*, 84 Cal. 646; *Foard v. McComb*, 12 Bush, 723; *Ingalls v. Miller*, 121 Ind. 188; *West v. Wright*, 98 Ind. 335; *Brown v. Blunt*, 72 Mo. 415; *McAleer v. Horsey*, 35 Md. 439; *Savage v. Stevens*, 126 Mass. 207; *Tucker v. White*, 125 Mass. 344; *Litchfield v. Hutchinson*, 117 Mass. 195; *Fisher v. Mellen*, 103 Mass. 503; *Stone v. Denny*, 4 Met. 151; *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358; *Stone v. Covert*, 29 Mich. 359; *Bees v. Knapp*, 28 Mich. 53; *Bullitt v. Farrar*, 42 Minn. 8; ante, p. 485; *Busterud v. Farrington*, 36 Minn. 320; *Humphrey v. Merriam*, 32 Minn. 197; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Wilder v. De Cox*, 18 Minn. 470; *Sims v. Eiland*, 57 Miss. 607; *Walsh v. Morse*, 80 Mo. 568; *Caldwell v. Henry*, 76 Mo. 254; *Phillips v. Jones*, 12 Neb. 213; *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551; *Oberlander v. Spiess*, 45 N. Y. 175; *Meyer v. Amidon*, 45 N. Y. 169; *Lunn v. Shermer*, 93 N. O. 164; *Atna Ins. Co. v. Reed*, 33 Ohio St. 283; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717; *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313; *Peck v. Derry*, 59 L. T., N. S., 78; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925; *Taylor v. Ashton*, 11 Mees. & W. 401. In the late case of *Peck v. Derry*, 59 L. T., N. S., 78, Sir James Hannen said: "If a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true, in order to induce another to act upon the assertion, who does so act, and is then damnified, the person so damnified is entitled to maintain an action for deceit." So, too, if a party in conscious ignorance of the fact, recklessly represents that a thing is true, especially under circumstances where he ought to have known it to be false, he will be liable, in an action for false representations, to the person who,

relying on his statements, has suffered injury: *Derry v. Peek*, L. R. 14 App. Cas. 337; *Peek v. Derry*, 59 L. T., N. S., 78; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Beebe v. Knapp*, 28 Mich. 53; *Ingalls v. Miller*, 121 Ind. 188; *Lunn v. Shermer*, 93 N. C. 164.

INTENT TO DECEIVE ESSENTIAL TO MAINTAIN ACTION.—In order to maintain an action for false representations, it must be shown that the representations were fraudulently made with intent to deceive the person to whom they were made, and to induce him to act upon them: *Terrel v. Benett*, 18 Ga. 404; *Holdom v. Ayer*, 110 Ill. 448; *Schwabacker v. Riddle*, 99 Ill. 343; *Avery v. Chapman*, 62 Iowa, 144; *Hartford Ins. Co. v. Matthews*, 102 Mass. 221; *Tucker v. White*, 125 Mass. 344; *Sims v. Eiland*, 57 Miss. 83; *Griswold v. Sabra*, 51 N. H. 167; 12 Am. Rep. 76; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Marsh v. Falker*, 40 N. Y. 562; *Zabrickie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 551; *Young v. Corell*, 8 Johns. 23; 5 Am. Dec. 316; *Huber v. Wilson*, 23 Pa. St. 178; *Lebby v. Ahrens*, 26 S. C. 275; *Crown v. Brown*, 30 Vt. 707; *Smith v. Mariner*, 5 Wis. 551; 68 Am. Dec. 73. But if a false representation is made with knowledge of its falsity, an intent to deceive will be conclusively presumed: *Judd v. Weber*, 55 Conn. 267; *Endsley v. Johns*, 120 Ill. 489; 60 Am. Rep. 572; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; *Hudnut v. Gardner*, 59 Mich. 341; *Haven v. Neal*, 43 Minn. 315; *Cowley v. Smyth*, 46 N. J. L. 380; 50 Am. Rep. 432; *Griswold v. Gebbie*, 126 Pa. St. 353; 12 Am. St. Rep. 878; *Hins v. Campion*, L. R. 7 Ch. D. 344. Loomis, J., in delivering the opinion of the court in *Judd v. Weber*, 55 Conn. 267, said: "It is a mistake to suppose that it is essential to a fraudulent intent that it should reach forward and actually contemplate the resulting damage to the other party. There is a fraudulent intent, if one, with a view of benefiting himself by intentional falsehood, misleads another in a course of action which may be injurious to him."

REPRESENTATIONS MUST HAVE BEEN RELIED UPON.—In an action to recover damages for false representations, the plaintiff must show that he relied upon the representations made to him by the defendant, and that he was deceived thereby: *Bennett v. Gibbons*, 55 Conn. 450; *Mervin v. Arbuckle*, 81 Ill. 501; *Tuck v. Downing*, 76 Ill. 71; *Hiner v. Richter*, 51 Ill. 299; *Wheeler v. Randall*, 48 Ill. 182; *Bowman v. Carithers*, 40 Ind. 90; *Hagee v. Grossman*, 31 Ind. 223; *Jenkins v. Long*, 19 Ind. 28; 81 Am. Dec. 374; *Proctor v. McCoid*, 60 Iowa, 153; *White v. Smith*, 39 Kan. 752; *Windram v. French*, 151 Mass. 547; *Inhabitants of Webster v. Larned*, 6 Met. 522; *Cobb v. Wright*, 43 Minn. 83; *Humphrey v. Merriam*, 32 Minn. 197; *Priest v. White*, 89 Mo. 609; *Anderson v. McPike*, 86 Mo. 293; *Dunn v. White*, 63 Mo. 186; *Nelson v. Luling*, 62 N. Y. 645; *Ming v. Woolfolk*, 116 U. S. 599.

DAMAGE MUST BE PROVED TO SUSTAIN ACTION.—In order to sustain an action for false representations, the plaintiff must prove that he has sustained damage by reason of his reliance upon the representations. Fraud without damage is no ground for an action: *Ming v. Woolfolk*, 116 U. S. 599; *Jordan v. Pickett*, 78 Ala. 331; *Holton v. Noble*, 83 Cal. 7; *Freeman v. McDaniel*, 23 Ga. 354; *Danforth v. Cushing*, 77 Me. 182; *Fuller v. Hodgdon*, 25 Me. 243; *Byard v. Holmes*, 34 N. J. L. 296; *Munro v. Gahrner*, 3 Brev. 31; 5 Am. Dec. 531; *Nye v. Merriam*, 35 Vt. 438.

DAMAGES MUST BE PROXIMATE CONSEQUENCE.—The damages recoverable in an action for false representations must be the natural and proximate consequence of the false representations made, and such as can be clearly defined and ascertained: *Dawe v. Morris*, 149 Mass. 188; 14 Am. St. Rep. 404;

Bradley v. Fuller, 118 Mass. 239; *Lamb v. Stone*, 11 Pick. 527; *Thompson v. Phœnix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357; *Jex v. Straus*, 122 N. Y. 293.

MEASURE OF DAMAGES.—In an action for false representations in the sale of property, the measure of damages is the difference between the value thereof as sold and what its value would have been if it had been as represented: *Williams v. McFadden*, 23 Fla. 143; 11 Am. St. Rep. 345; *Nysegander v. Lowman*, 124 Ind. 584; *Page v. Wells*, 37 Mich. 415; *Stiles v. White*, 11 Met. 356; 45 Am. Dec. 214; *Vail v. Reynolds*, 118 N. Y. 297; *Lunn v. Shermer*, 93 N. C. 164. The measure of damages for a fraudulent representation that the vendor's title to slaves was absolute, when it was only a life estate, is the difference in the value of the two estates at the time of the sale: *Campbell v. Hillman*, 15 B. Mon. 508; 61 Am. Dec. 195. Where stocks are sold upon a false representation of their value, the measure of damages is the difference between their value as represented and as it was in fact at the time of the sale: *Miller v. Barber*, 66 N. Y. 558; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625. In an action for false representations which induced the plaintiff to compromise with the defendant, the measure of damages is the difference between what he received and what he would have received if no fraudulent concealment had been made: *Grabenheimer v. Blum*, 63 Tex. 369. In an action for a false representation by a vendor of land, that a certain privilege was annexed thereto, the measure of damages is the difference between the value of the land as it was and what its value would have been with the privilege annexed: *Monell v. Colden*, 13 Johns. 395; 7 Am. Dec. 390. On the question of damages, Bigelow says: "The true rule in cases of fraud, as in cases of negligence, probably is, that the defendant is liable for all loss which happens in the direct and natural course of things from the wrong": Bigelow on Fraud, 634.

FALSE REPRESENTATIONS IN PROSPECTUSES.—The directors of a company are liable to an action for damages for false statements contained in prospectuses issued by them, where they knew or ought to have known their falsity, and the plaintiff, relying on such statements, has acted upon them to his hurt: *Peck v. Derry*, 59 L. T. N. S., 78; *Tervilliger v. Great Western Tel. Co.*, 59 Ill. 249; *Booth v. Wonderly*, 36 N. J. L. 250; *Morgan v. Skiddy*, 62 N. Y. 319; *Cross v. Sackett*, 6 Abb. Pr. 247; *Fenn v. Curtis*, 23 Hun, 384; *Paddock v. Fletcher*, 42 Vt. 389.

FALSE REPRESENTATION INTENDED TO BE COMMUNICATED TO ANOTHER.—Where false and fraudulent representations are made to one person with the expectation and purpose that they should be communicated to another, and they are so communicated to the latter, by whom they are acted upon to his damage, the party making the representations will be liable: *Chubbuck v. Cleveland*, 37 Minn. 466; *Eaton v. Avery*, 83 N. Y. 31; 38 Am. Rep. 389.

But where the fraudulent representations were not intended to be acted upon by such third person, no action will lie therefor: *Wells v. Cook*, 16 Ohio St. 67; 88 Am. Dec. 436, and note 442-445, where this question is fully considered.

LIABILITY OF PUBLIC OFFICER FOR FALSE REPRESENTATIONS.—A public officer making false and fraudulent representations in respect to property sold by him is liable to an action for damages. His official character does not protect him: *Culver v. Avery*, 7 Wend. 380; 22 Am. Dec. 586; Bigelow on Fraud, 515. But see *Tucker v. White*, 125 Mass. 344.

ACTION NOT BARRED BY RETAINING PROPERTY.—The fact that the plaintiff has retained the property received by him will not bar his right to an

action for damages for false representations: *Nysegander v. Lowman*, 124 Ind. 584; *Johnson v. Culver*, 116 Ind. 278; *St. John v. Hendrickson*, 81 Ind. 350; *Nasman v. Oberle*, 90 Mo. 666; *Parker v. Marquis*, 64 Mo. 38; *Grabenheimer Blum*, 63 Tex. 369. Neither will the fact that the plaintiff performed his part of an executory contract after learning of the fraud: *Nasman v. Oberle*, 90 Mo. 666; *Parker v. Marquis*, 64 Mo. 38; *Grabenheimer v. Blum*, 63 Tex. 369.

WAIVER OF RIGHT. — If a person induced by false representations to enter into a contract, upon afterwards obtaining full knowledge of the fraud and of all the material facts, declines to repudiate it, but expressly ratifies it, he cannot maintain an action for damages: *Nounnan v. Sutter County Land Co.*, 81 Cal. 1; *St. John v. Hendrickson*, 85 Ind. 350. Or if he discovered the fraud in time to save himself, and failed to do so, he cannot recover: *Whiting v. Hill*, 23 Mich. 399; *Vernol v. Vernol*, 63 N. Y. 45. But to constitute a waiver of a right to sue for damage resulting from a contract procured by fraud, the party who sustained the loss must act with full knowledge of his rights and of the material facts in the case, and clearly manifest his intention to abide by the contract and abandon any remedy he may have: *Johnson v. Culver*, 116 Ind. 278. A waiver is not shown by the fact that the plaintiff received part of the goods under the contract: *Haven v. Neal*, 43 Minn. 315; *Mallory v. Leach*, 35 Vt. 156; 82 Am. Dec. 625. Where one of the joint makers of a note, not knowing that he was not liable on it, stated to a person about to purchase it that it was a good note, and that he intended to pay it, it was held that this did not render him liable for false representations: *Black v. Miller*, 75 Mich. 323.

CONSUMERS' GAS COMPANY OF KANSAS CITY v. KANSAS CITY GASLIGHT AND COKE COMPANY.

[100 MISSOURI, 501.]

EQUITY WILL NOT ENJOIN CLAIM OF EXCLUSIVE FRANCHISE WHEN. — A court of equity will not restrain, by injunction or otherwise, a person from asserting a claim of exclusive privilege in the manufacture and sale of a commodity, where there is no interference with the property of the complainant, further than by making the claim of exclusive privilege or franchise.

PETITION for an injunction. The facts are stated in the opinion.

C. O. Tichenor, and Broadhead and Haussler, for the appellant.

Gage, Ladd, and Small, for the respondent.

BARCLAY, J. Giving to the petition the construction most favorable to the pleader, it yet states no cause of action for equitable relief. Plaintiff claims the right to manufacture and vend gas to the people of Kansas City, and to adopt the needful and usual measures for that purpose. It asserts that

defendant's franchise to make and sell gas in that city is not exclusive, but is claimed to be so by defendant; and that such claim of exclusive right and of an intention to assert it is an irreparable injury to plaintiff's credit and business, against the continuance of which an injunction and other proper relief should be granted.

As no intimation is thrown out of any insolvency of defendant, we need not consider whether such an allegation would strengthen plaintiff's position on the pleadings. As they now stand, the point in dispute is, simply, whether or not equity can properly intervene, by injunction or otherwise, to prevent defendant from asserting a claim of exclusive privilege in the manufacture and sale of gas in the circumstances already described.

Plaintiff does not allege that defendant is interfering in any way with the property of the former, further than by making the claim of exclusive privilege or franchise mentioned. As now presented, therefore, the case is an attempt to enjoin defendant from an alleged slander of the title and franchises of plaintiff. As such, it is not one for equitable relief on the facts stated.

This question has been so lately and fully considered by a court of high authority, whose views on this point we approve, that we content ourselves with merely citing its opinions on the subject. In them will be found references to many other cases supporting the conclusion we announce: *Whitehead v. Kitson*, 119 Mass. 484; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310.

Whether or not defendant has in fact the exclusive privilege claimed is not material to the determination of this case.

We therefore regard the ruling of the trial court sustaining the demurrer to the petition as correct, and affirm its judgment.

EQUITY, JURISDICTION OF, TO ISSUE INJUNCTION. — It is not within the jurisdiction of a court of equity to restrain by injunction representations as to the character and standing of the plaintiff, or as to his property, although such representations may be false, if there is no breach of trust or of contract involved: *Raymond v. Russell*, 143 Mass. 295; 58 Am. Rep. 137; provided there is no invasion of the plaintiff's rights or his property: *Brandreth v. Lance*, 8 Paige, 24; 34 Am. Dec. 368.

STATE v. CLAYTON.

[100 MISSOURI, 516.]

INDICTMENT FOR ASSAULT WITH INTENT TO KILL MUST CHARGE FELONIOUS INTENT. — A crime that is liable to be punished by imprisonment in the penitentiary is a felony. Assault with intent to kill is such a crime, and an indictment therefor must therefore charge that the assault was made with felonious intent, for without a felonious intent there can be no felony.

ASSAULT MAY BE CHARGED IN INDICTMENT IN GENERAL TERMS without specifying the means by which it was made.

EVIDENCE OF PREVIOUS DIFFICULTY WITH WHICH DEFENDANT WAS NOT CONNECTED INADMISSIBLE. — On the trial of a prisoner charged with felonious assault, it is error to admit evidence of a previous difficulty between the party alleged to have been assaulted and the defendant's brother, where the defendant was in no way connected with it. And if such evidence is admitted by the court, with the promise that unless defendant's connection with such prior difficulty is shown it will withdraw it from the jury, and this is not done, the action of the court has the effect to sanction the inadmissible testimony, and is error.

LAW SPECIALLY PROTECTS OFFICER ONLY WHILE ACTUALLY ENGAGED IN PERFORMING OFFICIAL DUTY; when engaged in a mere personal encounter, he has no greater rights than any other citizen. It is therefore error, on the trial of a prisoner for assault to kill, to admit evidence that the person alleged to have been assaulted at the time held the office of town marshal, when there is no testimony showing that he was then acting in his official capacity as a peace-officer.

INSTRUCTIONS GIVEN AT INSTANCE OF STATE in this case, held not liable to any valid objection.

INDICTMENT. The opinion states the case.

Amos S. Smith, for the appellant.

John M. Wood, attorney-general, for the state.

SHERWOOD, J. The charging part of the indictment in this cause is the following: "That William C. Clayton, late of the county aforesaid, on or about the seventeenth day of June, 1886, at the county of Hickory, state aforesaid, did, upon the body of one Thomas G. Allen, then and there being, feloniously, on purpose, and willfully, with a deadly weapon, to wit, a revolving pistol loaded with gunpowder and leaden balls, which he, the said William C. Clayton, then and there had and held, did then and there make an assault with intent him, the said Thomas G. Allen, then and there, to kill, against the peace and dignity of the state."

1. The indictment herein attempts to charge a felony; that is, a crime which is liable to be punished by imprisonment in the penitentiary, not one which must be thus punished: R. S.

1879, sec. 1676. This has been the law in this state over fifty years: Stats. 1835, sec. 36, p. 216; R. S. 1845, sec. 36, p. 414; R. S. 1855, sec. 38, p. 645; Gen. Stats. 1865, sec. 33, p. 828; *Johnston v. State*, 7 Mo. 183; *Ingram v. State*, 7 Mo. 293; *State v. Murdock*, 9 Mo. 730; *State v. Green*, 66 Mo. 632. Being thus a felony, it was indispensable that the indictment should charge that the act, to wit, the assault, was done with a felonious intent, because without a felonious intent there can be no felony: *Curtis v. People*, Breese, 256; *State v. Swann*, 65 N. C. 330; 1 Archbold's Criminal Pleading, 885, 929; 3 Chitty's Criminal Law, 788, 828; 2 Bishop's Criminal Procedure, secs. 79, 651, 653; *State v. Thompson*, 30 Mo. 470; *Beasley v. State*, 18 Ala. 535.

The making of an assault like the one under discussion is not a new offense created by statute; it was an offense at common law, but was only a misdemeanor: 1 East P. C. 411. The grade of the offense, however, having been raised to a felony, the common-law rules as to charging felonies must apply, and the act charged like any other felony originating at common law. On this ground it must be held that the indictment is insufficient, and that the objections to its sufficiency were well taken.

2. It seems that most of the authorities favor the view that assaults may be charged in general terms, that is, without specifying the means by which the assault was made: 2 Bishop's Criminal Procedure, secs. 77, 656. In this state, however, the point has been ruled both ways. Thus in *State v. Jordan*, 19 Mo. 212, and *State v. Greenhalgh*, 24 Mo. 373, it was held essential to state the manner in which the assault was made. In *State v. Chumley*, 67 Mo. 41, without advert-ing to former opinions, it was ruled that it was unnecessary to allege the manner of the assault. And in *State v. Chandler*, 24 Mo. 371, 69 Am. Dec. 432, it was ruled that the manner of the assault charged need not be alleged. It is therefore an open question in this state, and we decide to follow the general current of authorities and the well-established forms and precedents, and hold the present indictment good in the particular mentioned: 3 Chitty's Criminal Law, 821, 828.

3. Allen, upon whom the assault is charged to have been made, had an encounter, a few moments before the assault occurred, with Charley Clayton, in which the latter was shot and killed. William C. Clayton was not present when this passage at arms occurred, and had nothing at all to do with it.

Any testimony on this point was wholly irrelevant, and should not have been admitted. If there had been any connection shown between the two encounters, if they both had formed but part of the *res gestæ*, then it would have been different: 2 Bishop's Criminal Procedure, sec. 662; *Johnston v. State*, 7 Mo. 183. As it was, an entirely independent matter was injected into the trial of this cause, the only effect of which was to distract the minds of the jurors from the real issues, or else to fill their minds with prejudice against the accused: *State v. Parker*, 96 Mo. 382, and cases cited. The court had promised that "unless defendant's connection with such prior difficulty was shown, he would withdraw it from the jury"; but this was not done. This action of the court, therefore, had the effect to sanction this inadmissible testimony, and it went to the jury with the approval of the court impressed upon it. This was error, and is condemned by the ruling in *State v. Rothschild*, 68 Mo. 52, where a similar promise, and a similar failure to comply with it, occurred.

The like line of argument applies to the action of the trial court in refusing to give the fourth instruction, in which defendant asked that such objectionable testimony be withdrawn from the jury.

4. And for similar reasons, testimony should not have been admitted that Allen, at the time of the assault, held the position of town marshal. There was no testimony whatever that Allen was acting in his official capacity as a peace-officer in trying to effect the arrest of the defendant at the time the assault was made; and certainly because he was such an officer gave him no greater rights than any other citizen, when engaged in a mere personal encounter. Indeed, the testimony of Kinney rather seems to show that Allen himself was the assaulter, instead of the party assaulted. If so, the fact that Allen was marshal had no possible relevancy to the case, and should have been excluded. In this latitude, at least, we have not yet reached the point where "there's such divinity doth hedge" an official that he is exempted from the operation of the ordinary laws of the country. As to those laws, he occupies just the same position as the humblest citizen,—no better and no worse. It is only while an officer is actually engaged in performing some official duty that the law throws around him its "special protection," and not otherwise or elsewhere: *State v. Dierberger*, 96 Mo. 666; *State v. McNally*, 87 Mo. 652 et seq., and cases cited.

5. The instructions given at the instance of the state by the court were as follows:—

“The court instructs the jury that if they find, from the evidence, that William C. Clayton, at any time within three years prior to the finding of the indictment in this cause, at the county of Hickory, and state of Missouri, feloniously, on purpose, and willfully, made an assault on one Thomas G. Allen, with a pistol loaded with gunpowder and leaden balls, with the intent him, the said Thomas G. Allen, then and there, to kill, they will find defendant guilty, and assess his punishment at imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by both a fine of not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars.

“The court instructs the jury that before they can acquit the defendant on the ground of a reasonable doubt, such doubt must be a substantial doubt, and not a mere possibility of his innocence.

“The court instructs the jury that in passing upon the guilt or innocence of the defendant, they will take into consideration all the facts and circumstances detailed in evidence.

“The court instructs the jury that before they can acquit the defendant upon the ground of self-defense, you must believe and find, from the evidence, that the defendant had reasonable cause to apprehend that Thomas Allen was about to inflict upon him some great bodily harm, and that such danger was imminent and impending; and unless you so believe, you will find defendant guilty, and assess his punishment as provided in these instructions.”

No valid objection can be taken to these instructions.

For the errors aforesaid, the judgment will be reversed, and the cause remanded.

INDICTMENT — FELONY. — An indictment for a felony should charge that the act was done feloniously, or with felonious intent: *State v. Herrell*, 97 Mo. 105; 10 Am. St. Rep. 289; *Kaelin v. Commonwealth*, 84 Ky. 354. And a felony is any offense punishable with death or by imprisonment in the state prison: *Smith v. State*, 33 Me. 48; 54 Am. Dec. 607.

CRIMINAL LAW — EVIDENCE — PREVIOUS DIFFICULTY. — Upon a trial of one for a felonious assault, evidence of the particulars of a previous affray with another, at which defendant was not present, and forming no part of the affray with which he is charged, is not admissible: *People v. Pearl*, 76 Mich. 207; 15 Am. St. Rep. 304.

CRAIG v. VAN BEBBER.

[100 MISSOURI, 684.]

DISAFFIRMANCE OF DEED OF MINOR AFTER ATTAINING MAJORITY. — Where a minor executes a deed of conveyance of land, and after attaining majority, conveys the same land to a third person, the second deed is a disaffirmance of the first. Such a deed may also be avoided by a suit in ejectment, and in such suit a petition which is in the ordinary form of an action of ejectment is sufficient.

INFANT MAY REPUDIATE CONTRACT WITHOUT RETURNING CONSIDERATION WHEN. — The rule that requires an infant who, upon coming of age, repudiates a contract executed by him during his minority, and which has been in whole or in part executed by the adult party thereto, to return the property or consideration received, applies only where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered it during infancy, he can repudiate the contract without making a tender thereof.

UNPAID PURCHASE-MONEY NOT RECOVERABLE BY INFANT WHO REPUDIATES HIS DEED. — Where an infant, upon attaining his majority, repudiates his deed, he cannot recover the unpaid purchase-money.

RATIFICATION OF MINOR'S DEED, CONDITIONAL OFFER TO CONVEY IS NOT. — An offer by an infant, after attaining full age, to make a deed ratifying a conveyance made by him during his minority, upon condition that the unpaid purchase price is paid or secured, is no evidence of a confirmation.

DEED DISAFFIRMED BECAUSE OF MINORITY OF WIFE IS AVOIDED AS TO HUSBAND, who joined her in executing it.

EJECTMENT. The opinion states the case.

Silver and Brown, and W. J. Patterson, for the appellants.

H. K. West and A. W. Mullins, for the respondents.

BLACK, J. This is an action of ejectment for one hundred acres of land commenced by Ella Craig and her husband, Daniel Craig, against Van Bebber, Tully, and Sprankle. The plaintiff Ella Craig inherited the land from her father, and she and her husband conveyed the same to Henderson Tabor by a deed dated the 28th of July, 1884, for the consideration of \$1,463. Of this amount Tabor paid in cash \$350, and executed to them his four notes due in one, two, three, and four years for the balance of the purchase price, and secured the same by a deed of trust on the land. The sale was made through an agent, and the agreement was, that the plaintiffs should have the first deed of trust. It seems, however, that Tabor gave a deed of trust on the land to secure a debt of eight hundred dollars, which was, by some manipulation, made prior in point of time to the one given the plaintiffs for purchase-money. This prior deed of trust was made by

Tabor to one J. B. Watkins as trustee. By virtue of authority set out in the deed of trust, Watkins constituted W. J. Patterson his attorney in fact to act for and in his behalf. Patterson, as such attorney in fact for Watkins, advertised and sold the property to defendant Sprankle on the 8th of October, 1886. The other defendants are the tenants of Sprankle.

The plaintiff Ella Craig was a minor sixteen years of age when she and her husband executed the deed to Henderson Tabor. The notes executed by Tabor are now in the possession of the plaintiffs, and have not been paid. Mrs. Craig became eighteen years of age on the eighteenth day of March, 1886, and this suit was commenced in November, 1886, to disaffirm the deed made by her while a minor.

Plaintiffs did not offer to refund the \$350. The evidence offered to show a ratification is, in substance, this: As soon as the plaintiffs learned that their deed of trust was a second lien instead of the first, they demanded a first deed of trust according to their contract, but their demand was refused. They also demanded payment of the notes, which was refused. They executed a new deed after the wife became of age, and offered to deliver it provided the notes were paid or secured by a first deed of trust, but upon no other condition. The plaintiff Daniel Craig being asked if any suit had been brought for the collection of the notes, said: "I think there has been; at Linneus, I think." It does not appear when the suit was brought, or what became of it. The notes, it is agreed, are in the possession of plaintiffs.

1. The point made here, and by a refused instruction, that the plaintiffs should have in terms set out in their petition and pleaded disaffirmance of the deed, is not well taken. Where a minor executes a deed of conveyance of land, and after attaining majority conveys the same land to a third person, the second deed is a disaffirmance of the first: *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441. So, too, the deed executed while a minor may be avoided by a suit in ejectment after majority: 1 Hare and Wallace's Am. Lead. Cas., 5th ed., 317; Tiedeman on Real Property, sec. 793. A petition which is in the ordinary form of an action of ejectment is sufficient.

2. Defendants asked, but the court refused to give, the following declaration of law: "The infancy of Ella Craig does not entitle plaintiffs to recover, as no offer or tender was made by them to return to Sprankle funds or consideration received

by Ella Craig, arising from the sale and conveyance of the land by her to Tabor."

The theory of this instruction is, that plaintiffs were bound to make a tender to Sprankle of the \$350 paid them by Henderson Tabor, the grantee in the deed which the plaintiffs seek to avoid. Where the contract has been executed by the infant, and has been in whole or in part executed by the adult, and the infant, upon coming of age, repudiates the transaction, he must return the property or consideration received. This general rule has often been stated without any qualification whatever. But the weight of authority is, that the rule can only apply where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered the consideration or property during infancy, then he can repudiate the contract without making a tender: Tyler on Infancy, 2d ed., sec. 37; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117; *Reynolds v. McCurry*, 100 Ill. 356; *Brandon v. Brown*, 106 Ill. 519; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Walsh v. Young*, 110 Mass. 396. The privilege of repudiating a contract is accorded an infant, because of the indiscretion incident to his immaturity; and if he were required to restore an equivalent, where he has wasted or squandered the property or consideration received, the privilege would be of no avail when most needed. *Kerr v. Bell*, 44 Mo. 120, *Highley v. Barron*, 49 Mo. 103, and *Baker v. Kennett*, 54 Mo. 82, are cited as affirming the general rule before stated, without any exception, and some expressions used would seem to lead to that result; but a careful consideration of the facts of these cases will show that there was no occasion for considering the exception. The remarks there made must be read and understood in the light of the facts before the court. We entertain no doubt but the rule, with the qualification before stated, is the correct one.

The instruction is, therefore, faulty, and especially so in view of the evidence that Mrs. Craig did not have any money or property save the land in question. The notes are in the hands of the plaintiffs, and the fact of disaffirmance will discharge the maker; for the law is well settled that the infant, having repudiated his or her deed, cannot recover the unpaid purchase price.

3. The evidence fails to make out a *prima facie* case of ratification. There is no evidence that either Mrs. Craig or her hus-

band ever received any part of the purchase price after she attained her majority. She and her husband did offer to execute and deliver a confirmatory deed upon being paid the balance of the purchase price, namely, \$1,113, or upon receiving a first deed of trust upon the land securing that amount; but it did not suit the purposes of Tabor, or any other of the interested parties, to comply with that condition.

A mere acknowledgment that a debt exists or that a contract has been made will not constitute a ratification: *Baker v. Kennett*, 54 Mo. 82. There must be an intention to affirm the deed. A deed of confirmation is not necessary, but the act relied upon must be of such a nature as to show a clear intention to confirm the deed. An offer to make a deed of ratification upon the condition that the unpaid purchase price is paid or secured is no evidence of a confirmation. It rather shows a disposition to disaffirm should the proposed condition not be performed.

4. This suit was brought for the very purpose of disaffirming the deed made by Mrs. Craig, and she was a proper and a necessary party plaintiff. Her husband is but a nominal party to the suit. But it is insisted that the wife cannot recover, because the husband is entitled to the possession of her land, and that he cannot recover, because by joining her in the deed he parted with his possession and right of possession.

Mrs. Craig held the land in question as her general property under section 3295 of the married woman's act. That section declares that a conveyance made by the husband during coverture of any interest in such real estate shall be invalid, unless the deed is executed jointly by the wife and husband, and by her duly acknowledged. This statute, it has been held again and again, very materially modifies the common-law marital rights of the husband in the lands belonging to the wife. It is, so far as he is concerned, a disabling statute; so that he is utterly powerless to charge or convey the land, or the rents, issues, or products thereof, except by a deed jointly executed by himself and wife: *Mueller v. Kaessmann*, 84 Mo. 323; *Gitchell v. Messmer*, 87 Mo. 131; *Gilliland v. Gilliland*, 96 Mo. 522; *Wilson v. Albert*, 89 Mo. 537.

If the deed jointly executed by husband and wife is invalid as to the wife, because not properly acknowledged by her, or because her signature has been procured by fraud, then it is ineffectual to convey the husband's limited marital interest:

Goff v. Roberts, 72 Mo. 571; *Bartlett v. O'Donoghue*, 72 Mo. 563; *Hoskinson v. Adkins*, 77 Mo. 538; *Hord v. Taubman*, 79 Mo. 101. These authorities show that a conveyance by husband and wife of the lands of the wife, to be valid as against the husband, must be valid as against the wife. Now, it is true that in the cases cited the deeds were worthless from the beginning, whilst here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole.

The law of this case is with the plaintiffs, and the judgment is affirmed.

CONTRACTS OF INFANTS. — There is, perhaps, no subject of the law about which there has been more apparent as well as real conflict of opinion than upon the effect to be given to the contracts of infants. It is true that there is less conflict at the present day than formerly, and that some of the erroneous positions previously taken have been abandoned, but there is yet much confusion, inconsistency, and difference of opinion. Some sentimental notions entertained at the beginning concerning the incapacity of infants, and the favor with which the persons and property of infants should be regarded, are no doubt responsible for much of the uncertainty and error which time has found so difficult to remove. Experience has fully demonstrated that when courts permit sound sense and principles of justice to all concerned to be overshadowed with the idea that one of the parties must be favored, the results are certain to be unsatisfactory. While infants should be protected from the consequences of their inexperience and immaturity of judgment, it should not be forgotten that their protection does not require the situation of persons who have dealt with them in good faith to be entirely overlooked.

Infants, the law says, are destitute of sufficient understanding to enter into contracts generally which shall be binding upon them. "The law, therefore," in the language of Chief Justice Parsons in *Baker v. Lovett*, 6 Mass. 78, 80, "protects their weakness and imbecility so far as to allow them to avoid all their contracts by which they may be injured. But in favor of infants, they are bound by all reasonable contracts for their maintenance and education, and also by all acts which they are obliged by law to do." Yet we are to understand by this, in the light of modern authority, as will be seen hereafter, that in the exercise of their right to avoid their general contracts, they are the exclusive judges of the fact whether or not they may be injured; or to speak more accurately, they may avoid their contracts without regard to the question whether or not such contracts are injurious or are beneficial to them.

It is very evident that this incapacity to contract could not be practically determined as a matter of fact in each particular case, without considerable or even great difficulty, and that it would be better to adopt an arbitrary age under which all persons are incapable, as a matter of law, of entering into binding contracts in general. This age the common law has fixed at twenty-

one year. "The law," says Parsons, C. J., "has drawn no line between an infant of six years old and one of twenty years old; for all infants are entitled to equal protection": *Baker v. Lovett*, 6 Mass. 78, 81. "A minor who has nearly attained his majority may be as able to protect his interests in a contract as a person who has passed that period. But the law must necessarily fix some precise age at which persons shall be held *sui juris*. It cannot measure the individual capacity in each case as it arises. It must hold the youth who has nearly reached his majority to be no more bound by his contract than a child of tender years": *McCarty v. Carter*, 49 Ill. 53, 55; 95 Am. Dec. 572, 573, per Lawrence, J.

It is undoubtedly competent, however, for the legislature to change the age at which a person shall reach his majority, and have an unrestricted ability to contract, from twenty-one years to any other age it may see fit. Thus in a number of states of this country, females, by statute, reach their majority at eighteen. Again, the legislature may fix a legal age for persons to enter into particular kinds of contracts only, as, for instance, in the various statutes passed by Congress relating to enlistments into the army and navy of the United States. Indeed, if the legislature should entirely remove the disability of age, we should say there would be no legal objection. In fact, it has done this in certain cases, in which statutes are made to apply without special regard to age; although a somewhat variable age of maturity or discretion may be contemplated, as in the statutes which impose upon a father the obligation of supporting his bastard child, and which render a contract providing for such support binding.

The very protection afforded by the law to infants, by which they are enabled to avoid their general contracts, requires them, as will be more fully seen hereafter, to answer for the reasonable value of necessities with which they may be furnished. An infant must sometimes himself engage for maintenance, clothing, shelter, and the like, and he should, consequently, be held bound to pay what they are justly worth, if they are requisite and suitable for him. His obligation to pay for the reasonable value of necessities constitutes, therefore, a common-law exception to the general rule that an infant is not bound by his contracts.

Another exception, which is sometimes said to exist to the general rule, is, that if an infant does an act which by the law he might have been compelled to do, the act shall be binding upon him. But this, as will be shown, has really very little to do with the subject of contracts.

Aside from these exceptional cases, the rule is elementary, as has been said, that infants shall not be bound by their contracts. The difficulty has been as to whether any or all of the contracts were void or simply voidable.

VOID AND VOIDABLE. — There have been some expressions of opinion, and even adjudications, to the effect that the general contracts of infants were void. As late as the year 1810, the narrow-minded Sir James Mansfield is reported as saying that he "never could understand the rule of law that an infant's contract was not void, but voidable": *Gibbs v. Merrill*, 3 Taunt. 307, 313; also *Burgess v. Merrill*, 4 Taunt. 468, 469. Three classes of infants' contracts have been, however, more usually made; namely, those which are binding, those which are void, and those which are voidable. The class of binding contracts, noticed above, is pretty well defined; but it has not been so easy for the courts to determine which contracts were void and which voidable. Various criterions to solve the problem have been suggested, but they are so unsatisfactory that one writer remarks: "What contracts of an infant are void, and what are merely voidable, nobody knows."

It may be well to notice here the meaning of the words "void" and "voidable." A "void" contract, if we may use the expression, is a mere nullity, and good for no purpose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid. A "voidable" contract, on the other hand, is one that is good, both as between the parties to it and as to third persons, until it is avoided by the party entitled to avoid it. It is valid and binding until thus disaffirmed, and its infirmity may be completely cured by a ratification by the party at whose instance it might have been avoided. It is important to note this distinction between "void" and "voidable." Much of this confusion of this subject of infants' contracts has resulted from the careless use of the word "void" as meaning only "voidable," and an examination of many cases which have been supposed to support the proposition that infants' contracts were "void" will show that nothing more was intended by the courts, or at least was necessary for the decision, than to hold that the contracts were merely "voidable."

The test by which to ascertain whether an infant's general contracts were void or voidable, as laid down by Perkins, an early writer, in his work on conveyancing, section 12, is as follows: "All such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable by himself and his heirs, and by those who have his estate." The view was at one time entertained that Perkins, in this passage, referred to the delivery of the thing granted, and not to the delivery of the instrument; and therefore a feoffment with livery of seisin by the infant in person was always voidable, and not void, "not only because he is allowed to contract for his benefit, but because there ought to be some act of notoriety to restore the possession to him equal to that which transferred it from him": *Bac. Abr.*, tit. Infancy and Age, I, 3. But in the leading case of *Zouch v. Parsons*, 3 Burr. 1794, 1804, the rule of Perkins was approved by Lord Mansfield, and interpreted to mean the delivery of the instrument. Thus he says: "The words 'which do take effect' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest. . . . There is no difference in this respect between a feoffment and deeds which convey an interest. The reason is the same."

As thus interpreted by Lord Mansfield, Perkins's rule is expressly approved in *Allen v. Allen*, 2 Dru. & War. 307, 338, and in a number of cases, mostly early ones, decided in this country: *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Phillips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243; 19 Am. Dec. 71, 77; *Kline v. Beebe*, 6 Conn. 494, 504; *Dana v. Coombs*, 6 Me. 89, 90; 19 Am. Dec. 194, 195; *Wambole v. Foote*, 2 Dak. 1. This criterion, comprehending, as it does, only gifts, grants, and deeds, is not sufficiently extensive in its application, and has been well said in *Cummings v. Powell*, 8 Tex. 80, 89, to have "very little foundation in reason," and to "afford but a very flimsy protection, which is the object of the rule."

Another test is that given by Lord Chief Justice Eyre in *Keane v. Boycott*, 2 H. Black. 511, 515, as follows: "We have seen that some contracts of infants, even by deed, shall bind them. Some are merely void; namely, such as the court can pronounce to be to their prejudice. Others, and the most numerous class, of a more uncertain nature as to benefit or prejudice,

are voidable only, and it is in the election of the infant to affirm them or not." This criterion had really been previously announced by Lord Hardwicke in *Harvey v. Ashley*, 3 Atk. 607, 610; and by Lord Mansfield in *Earl of Buckinghamshire v. Drury*, 2 Eden, 72; 4 Bro. C. C. 607, note (*sub nom. Drury v. Drury*); in *Zouch v. Parsons*, 3 Burr. 1794; and *Grey v. Cooper*, 3 Doug. 65; and is afterwards approved by Lord Ellenborough in *Baylis v. Dinely*, 3 Maule & S. 477. In *United States v. Bainbridge*, 1 Mason, 71, 82, Mr. Justice Story says that the distinctions of the lord chief justice "seem founded in solid reason." And see the rule further expressly approved in *Tucker v. Moreland*, 10 Pet. 59, 66; 1 Am. Lead. Cas. *224, *226; *Wheaton v. East*, 5 Yerg. 41, 61; 26 Am. Dec. 251, 252; *McMinn v. Richmonds*, 6 Yerg. 9, 18; *McGan v. Marshall*, 7 Humph. 121, 125; *Langford v. Frey*, 8 Humph. 443; *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Robinson v. Weeks*, 58 Me. 102, 106; *Fridge v. State*, 3 Gill & J. 103, 115; 20 Am. Dec. 463, 468; *Levering v. Heighe*, 2 Md. Ch. 81, 83; 3 Md. Ch. 365, 368; *Cronise v. Clark*, 4 Md. Ch. 403, 406; *Monumental Building Ass'n v. Herman*, 33 Md. 128, 132; *Pücher v. Turin Plank Road Co.*, 10 Barb. 436, 439; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696.

Other cases adopt this latter test in a somewhat qualified form, asserting that no contracts of an infant are void, unless they necessarily, or clearly or certainly, operate to his prejudice: *Oliver v. Houdlet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Vent v. Osgood*, 19 Pick. 572, 573; *West v. Penny*, 16 Ala. 187, 189; *Hastings v. Dollarhide*, 24 Cal. 195, 209; and see *Bradford v. French*, 110 Mass. 368, per Gray, J. Thus in *Oliver v. Houdlet*, 13 Mass. 237, 239, 7 Am. Dec. 134, 135, Wilde, J., says: "It would be more correct to say that those acts of an infant are void which not only apparently, but necessarily, operate to his prejudice. The benefit to the infant is the great point to be regarded, the object of the law being to protect his imbecility and indiscretion from injury, through his own imprudence or by the craft of others. The general rule is, that infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, that his contracts, although voidable by him, shall bind the person of full age. This rule seems to require that all contracts of infants should be held voidable, rather than void. But however this may be, all the books agree that those which are beneficial, or have a semblance of benefit, to the infant, are only voidable." In *Vent v. Osgood*, 19 Pick. 572, 573, Putnam, J., says that if the contract of an infant be clearly prejudicial to him, it is void; if it may be for his benefit or to his damage, it is voidable, at his election; and if it be clearly beneficial to him, it is void; yet it is difficult to reconcile this statement with his expression of opinion, in the same case, that an infant is not bound by an account stated.

The rule of *Keane v. Boycott*, 2 H. Black. 511, 515, is not necessarily inconsistent with that of Perkins. In fact, the two have been frequently applied together, the former being usually regarded as the more general rule, and the rule of Perkins a special rule. While it is said that all deeds of an infant which do not take effect by delivery of his hand are void, yet if the deeds do take effect by delivery of his hand, and are not upon their face a prejudice to him, or in other words, have a semblance of benefit, by purporting to be executed for a valuable consideration, they are voidable simply: *Bige-low v. Kinney*, 3 Vt. 353, 358; 21 Am. Dec. 589, 590; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243, 245; 19 Am. Dec. 71, 77, 79; *Küne v. Beebe*, 6 Conn. 494; and it would be in strict accordance with this theory to hold the deed of an infant,

executed without consideration, to be absolutely void: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639. In one case, however, it was said that acts of an infant which take effect by delivery are in all cases voidable only; while with respect to promises which do not take effect by delivery, the distinction was between those which have and those which have no semblance of benefit to the infant, the latter being absolutely void, and the former voidable only: *Cannon v. Alsbury*, 1 A. K. Marsh. 76, 77; 10 Am. Dec. 709, 710.

The courts exhibited a strong inclination at an early day to break away from the criterions of Perkins and Lord Chief Justice Eyre. In some of the cases a trace of Perkins's rule only was retained in *dicta* to the effect that the only exception to the rule that the deeds and contracts of infants were voidable merely was to be found in their deeds delegating a naked authority, which were absolutely void: *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; Woodworth, J., saying in the first of these cases that "there is no doubt that all the contracts which an infant can make, with a very few exceptions, are at least voidable, without regard to the question whether they are beneficial to him or not." While in other cases, among which are those which purport to adopt Chief Justice Eyre's rule with the interpretation as intending that no contracts of an infant are void unless they are necessarily prejudicial to him, the only portion of either rule which practically remains is enough of the benefit and detriment theory to warrant the expression of opinion that an infant's contract of suretyship is void: *Hastings v. Dollarhide*, 24 Cal. 195, 209, per Shafter, J.; *West v. Penny*, 16 Ala. 187, 189, per Collier, C. J.; compare *Fleener v. Dickerson*, 72 Ala. 318, 322. In *Weaver v. Jones*, 24 Ala. 420, 424, Chilton, C. J., says: "The better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of nonage; that is to say, the infant may ratify them after he arrives at the age of legal majority."

Even in *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 19 Am. Dec. 71, which approves both the rules of Perkins and Chief Justice Eyre, Robertson, J., remarks: "It is doubtful whether it would not be better for infants that none of their contracts should be avoided by any other persons than themselves, and consequently whether it would not be best that all their contracts should be only voidable." And in *Whitney v. Dutch*, 14 Mass. 457, 461, 7 Am. Dec. 229, 231, Parker, C. J., says: "The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts, and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree, is stated by Lord Mansfield in the case of *Zouch v. Parsons*, cited in the argument; viz., that whenever the act done may be for the benefit of the infant, it shall not be considered void, but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities. The application of this principle is not, however, free from difficulty; for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and when he came of age had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle that all simple contracts by infants which are not founded on an illegal consideration are strictly not void, but only voidable, and may be made good

by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults. With respect to contracts under seal, also, they are in legal force as contracts, until they are avoided by plea. Whether they can in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided." In *Reed v. Batchelder*, 1 Met. 559, Chief Justice Shaw also observes: "The question, what acts of an infant are voidable and what void is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them, when he comes of age, as his own views of his interest may lead him to elect."

Finally, it may now be considered as the settled rule that none of an infant's contracts are void because of his nonage, but all of them are voidable merely, with the exception of his contracts for the reasonable value of necessities, and his contracts made in pursuance of statutory authority, which are binding. The distinction that his contracts which cannot be for his benefit are absolutely void has become to be recognized as unreasonable and absurd; for the object of the law, which is to protect the infant against the consequences of his own indiscretion or the imposition of others, is completely secured by conferring upon him the power of disaffirming his contracts, or of ratifying them, after reaching proper age, at his pleasure. Again, there are serious difficulties in the way for the court to determine, either from the face of the transaction or from a collateral inquiry, whether the contract was for the benefit or detriment of the infant. Every argument, therefore, is in favor of leaving the question entirely to the infant to say whether the contract shall or shall not be binding upon him: *Hyer v. Hyatt*, 3 Cranch C. O. 276, 277; *Cheshire v. Barrett*, 4 McCord, 241, 244; 17 Am. Dec. 735, 738; *Cole v. Pennoyer*, 14 Ill. 158, 160; *Cummings v. Powell*, 8 Tex. 80, 85-90; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 337; 76 Am. Dec. 209, 211; *Fetrow v. Wiseman*, 40 Ind. 148, 151-155; *Harner v. Dipple*, 31 Ohio St. 72, 77; 27 Am. Rep. 496, 500.

These cases are among the leading ones upon the proposition. The courts, in *Cole v. Pennoyer*, 14 Ill. 158, 160, and *Fetrow v. Wiseman*, 40 Ind. 148, 151, 155, nevertheless repeat the error that an infant's power of attorney or appointment of an agent is void; and if this be true, a contract entered into by the agent, pursuant to his authority, is also void; yet there is no more reason for so holding than to hold that any other contract of an infant is void; and this is the view that is at present taken, as will be shown hereafter.

The singular doctrine has occasionally been advanced that the executed contracts of infants are binding until avoided, but their executory contracts are invalid until affirmed: *Edgerly v. Shaw*, 25 N. H. 514, 516; 57 Am. Dec. 349, 350; *State v. Plaisted*, 43 N. H. 413; *Minock v. Shortridge*, 21 Mich. 304, 315; *Morton v. Steward*, 5 Ill. App. 533, 535. Thus, says Gilchrist, C. J., in *Edgerly v. Shaw*, 25 N. H. 514, 516, 57 Am. Dec. 349, 350: "The executory contracts of an infant are said to be voidable; but this word is used in a sense entirely different from that in which it is applied to the executed contracts of an infant. In the latter case the contract is binding, until it is avoided by some act indicating that the party refuses longer to be bound by it. In the former case it is meant merely that the contract is capable of being confirmed or avoided, though it is invalid until it has been ratified." And again, in *Minock v.*

Shortridge, 21 Mich. 304, 315, Graves, J., remarks: "The executory contract of an infant, such as a promissory note, is not void in the sense of being a nullity, because it may be confirmed, but it has no binding force until it is confirmed. Being executory, and not binding until confirmed, it is said to be voidable; but as thus applied, this word is to be understood in a sense quite different from that which belongs to it when applied to the executed contract of an infant. The general rule is, that an executed contract is binding until avoided by words or conduct which show that the party refuses longer to be bound by it. But when it is said that the executory contract of an infant is voidable, the idea represented is, that the contract is susceptible of confirmation or avoidance by the promisor, though it is not binding until it is ratified." This is a senseless and erroneous distinction. Executory contracts of infants are no more invalid than executed contracts. Both are binding until disaffirmed. No one would contend that infants' executory contracts could be disregarded as nullities by the adult contracting parties, or by third persons, until they had been ratified; yet this is precisely what the doctrine leads to. It may be that a ratification will result from less positive acts or conduct in case of executed contracts than in case of executory; but this does not prove that the one class has a greater binding effect than the other.

It may finally be observed that the rules concerning the binding effect of infants' contracts are, in general, the same at law and in equity. This proposition is well expressed by Dorsey, J., in *Browner v. Franklin*, 4 Gill, 463, 468, as follows: "It is a general rule and well-settled principle, as well at law as in equity, that no person under the age of twenty-one years is competent to make a contract, binding upon him, unless it be for 'necessaries.' No executory contract, by him *bona fide* entered into during his minority, unless confirmed by him after arriving at years of maturity, can be decreed to be specifically performed by a court of equity, or enforced in a court of law. Nor, in the absence of such confirmation, when pursuing his legal rights, in contravention of such contract, can he be restrained from so doing, by a court of equity interposing a prohibition, by way of injunction." It is true that certain special rules, different from those at law, are enforced by courts of equity, as, for example, compelling infants to repay money advanced to them to procure necessities, and, perhaps, imposing conditions upon them when they seek the aid of equity for relief; but the general rule still remains, that their contracts have no more but the same binding force in courts of equity as in courts of law.

STATUTORY REGULATION. — It has already been said that persons under the age of twenty-one are sometimes permitted by statute to enter into contracts to which nonage is no defense. Special statutes have also been passed relating to the disaffirmance and ratification of contracts by infants, and concerning some other matters. These statutes, and the cases decided under them, will be found discussed under their appropriate heads. There are, however, some general statutes and some decisions which require a separate notice.

It has been held that a statute conferring capacity upon married women to contract generally does not thereby remove the disability of infancy: *Cummings v. Everett*, 82 Me. 260; nor can a statute giving validity to the marriage settlements of minors be held to further remove the disabilities of married infants to enter into contracts: *Burr v. Wilson*, 18 Tex. 367, 374; *Hemp-hill*, C. J., also saying (p. 376): "The general power of making contracts is not expressly or impliedly included in any of the laws conferring rights on married infants; and consequently they have the right to avail themselves

of their privilege, when any such contracts are attempted to be enforced." Where an early statute of Maryland provided that the orphans' court should have the power to appoint guardians to infant females until they attained the age of sixteen, or married, when the guardianship should cease, and the property delivered up to the wards or their husbands, it is held that the disabilities of infancy are not thereby removed, with the exception that a female infant on attaining the age of sixteen has capacity to receive from her guardian her real and personal estate. She cannot, therefore, under the age of twenty-one, make a binding disposition of her personal property: *Davis v. Jacquin*, 5 Har. & J. 100; nor is she even bound by a settlement with or release to her guardian: *Bowers's Adm'x v. State*, 7 Har. & J. 32; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. Statutes enabling married women to convey their lands and release their claims to dower in the lands of their husbands, and providing the manner in which the conveyances shall be executed likewise, do not remove the disability of infancy: See *post*, "Deeds of Infant Females Covert."

The legislation in England concerning infants' contracts has been radical and really extraordinary. By section 1 of the Infants' Relief Act, 1874, 37 and 38 Victoria, chapter 62, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void; provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable"; and by the second section: "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." There is no room for question that all contracts of infants falling within the provisions of this statute are mere nullities, and good for no purpose.

The Civil Code of California contains several sections on this subject, which, as amended, exhibit a minimum acquaintance with the general law and a maximum obscurity of thought. The sections certainly have not the "pride of ancestry," and we will venture to predict that in an intelligent community they have not the "hope of posterity." The principal sections are as follows: Sec. 33. "A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control." Sec. 34. "A minor may make any other contract than as above specified, in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this title, and subject to the provisions of the titles on marriage, and on master and servant." Sec. 35. "In all cases other than those specified in sections 36 and 37 [sections concerning contracts for necessities, and obligations entered into under the express authority or direction of statutes], the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." Sections 15, 16, and 17 of

the Civil Code of Dakota are the same in language as the foregoing sections of the Civil Code of California, except that instead of the words "or within a reasonable time afterwards," in section 35 of the California code, section 17 of the Dakota code reads, "or within one year's time afterwards," and adds to the section, "with interest." It should be remarked that both in California and Dakota males attain their majority at twenty-one years, and females at eighteen years.

The result of this half-way legislation seems to be that any appointment of an agent by a minor during his or her entire minority is absolutely void, and consequently any contract made by such agent in pursuance of his appointment is absolutely void: See *Wamble v. Foote*, 2 Dak. 1. Furthermore, leaving out of consideration such contracts as are expressly made binding, any contract whatever made by a female minor during her whole minority, and by a male minor under the age of eighteen, relating to real property, is absolutely void. All purchases, sales, and leases of real property by and to such minors are consequently void. Again, any contract made by such minors, relating to any personal property not in his or her immediate possession or control, is also void. It seems that the contract of a male minor above the age of eighteen, relating to real property, is simply voidable; also, that the contract of a female minor or of a male minor under the age of eighteen, relating to personal property in his immediate possession or control, is likewise only voidable; also, that the contract of a male minor above the age of eighteen, relating to personal property, whether in his immediate possession or control, or not, is voidable; also, all other contracts, not relating to real or personal property, entered into by male or female minors of any age, are simply voidable. The provision concerning disaffirmance will be noticed hereafter, under the appropriate head. These distinctions made by the codifiers are perfectly senseless. It is difficult to appreciate the reason why it should be provided that if a female minor or a male minor under the age of eighteen owns personal property, she or he may make a voidable sale of it, if it be in her or his immediate possession or control, while if the property be not in such possession or control, the sale should be void; or why the purchase by such minor of personal property not in her or his immediate possession or control, or as would be usually the case, in the possession or control of the seller, should be absolutely void, while if such minor have possession of the property as a bailee for any purpose, the purchase be merely voidable.

In Georgia, it is provided that "the contracts of an infant under twenty-one years of age are void, except for necessities; and for necessities they are not valid unless the party furnishing them proves that the parent or guardian fails or refuses to supply sufficient necessities for the infant. If, however, the infant receives property or other valuable consideration, and after arrival at age, retains possession of such property, or enjoys the proceeds of such valuable consideration, such a ratification of the contract shall bind him"; Code 1882, sec. 2731. It is plain, both from this section in itself, and other sections connected with it, that although the legislature has used the word "void," what it really meant was "voidable"; for a void contract is not subject to ratification. Compare *Shuford v. Alexander*, 74 Ga. 293.

An early statute of Connecticut enacted "that no person under the government of a parent, guardian, or master shall be capable to make any contract or bargain which in the law shall be accounted valid, unless the said person be authorized or allowed so to contract or bargain by his or her parent, guardian, or master, in which case such parent, guardian, or master

shall be bound thereby." Under this statute it was held that a contract made by an infant who was under the care of a parent and guardian was absolutely void, and consequently could not be made valid by a ratification by the infant after he came of age: *Aleop v. Todd*, 2 Root, 105, 109. In other cases, however, it was held that the contracts of an infant under the government of a parent, guardian, or master, if against his interest, were void, and incapable of ratification, whileh is contracts with a semblance of advantage were voidable only: *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149. In reaching these conclusions, no stress seems to be placed on the fact whether the parent, guardian, or master authorized the infant to contract, except for the purpose of holding the parent, etc., liable. If the infant be not under the government of a parent, guardian, or master, his contracts, at least those which have a semblance of benefit, are voidable only: *Lawrence v. Gardner*, 1 Root, 477; *Kline v. Beebe*, 6 Conn. 494. Furthermore, it is held that an infant, to be incapacitated from contracting under the statute, must be under the legal and actual government of his parent, guardian, or master: *Kline v. Beebe*, 6 Conn. 494.

PARTICULAR CONTRACTS OF INFANTS. — The application of the foregoing general principles as to the binding effect of infants' contracts to the principal kinds of contracts will now be considered. It might be observed that while many of the cases discussing questions of disaffirmance and ratification of their contracts by infants may not expressly state that the contracts are voidable, as distinguished from void, yet the proposition is necessarily assumed, and the cases are really authorities to that effect.

DEEDS OF CONVEYANCE. — An infant's deed of conveyance, whether it be a feoffment, a deed operating under the statute of uses, or a statutory grant, it is well settled, is voidably only, and not void: *Whittingham's Case*, 8 Coke, 42 b; *Zouch v. Parsons*, 3 Burr. 1794; — *v. Hancock*, 17 Ves. 383; *Allen v. Allen*, 2 Dru. & War. 307, 338; *Tucker v. Moreland*, 10 Pet. 59, 70, 71; 1 Am. Lead. Cas. *224, *228, *229; *Irvine v. Irvine*, 9 Wall. 617; *Freeman v. Bradford*, 5 Port. 270; *Manning v. Johnson*, 28 Ala. 446; 62 Am. Dec. 732; *Hastings v. Dollarhide*, 24 Cal. 195; *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Cole v. Pennoyer*, 14 Ill. 158; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Hartman v. Kendall*, 4 Ind. 403, 404; *Pitcher v. Laycock*, 7 Ind. 398; *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; *Johnson v. Rockwell*, 12 Ind. 76; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Jenkins v. Jenkins*, 12 Iowa, 195; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; 5 T. B. Mon. 344; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236, 243; 19 Am. Dec. 71, 77; *Vallandigham v. Johnson*, 85 Ky. 288; *Hoffert v. Miller*, 86 Ky. 572; *Webb v. Hall*, 35 Me. 336, 338; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318, 319; *Key's Lessee v. Davis*, 1 Md. 42; *Ridgeley v. Crandall*, 4 Md. 435; *Kendall v. Lawrence*, 22 Pick. 540; *Allen v. Poole*, 54 Miss. 323, 330; *Ferguson v. Bell's Adm'r*, 17 Mo. 347, 351; *Youse v. Norcoms*, 12 Mo. 549; 51 Am. Dec. 175; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Boal v. Miz*, 17 Wend. 119; 31 Am. Dec. 285; *Eagle Fire Co. v. Lent*, 6 Paige, 635, affirming 1 Edw. Ch. 301; *Gillett v. Stanley*, 1 Hill, 121; *Van Nostrand v. Wright*, Hill & D. Sup. 260; *Dominick v. Michael*, 4 Sand. 374, 418; *Voorhies v. Voorhies*, 24 Barb. 150, 152; *McIlvaine v. Kaulst*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *Ihley v. Paillett*, 27 S. C. 300; *White v.*

Flora, 2 Over. 426, 431; *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; *Scott v. Buchanan*, 11 Humph. 468; *Cummings v. Powell*, 8 Tex. 80; *Bigelow v. Kinney*, 3 Vt. 353, 358; 21 Am. Dec. 589, 590; *Belinger v. Wharton*, 27 Gratt. 857; *Wilson v. Branch*, 77 Va. 65, 70; 46 Am. Rep. 709, 712; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381, 382; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445, 446. He may, therefore, ratify or disaffirm the deed at his majority, at his pleasure. This is so by statute in Georgia: Code 1882, sec. 2694; *Nathans v. Arkwright*, 66 Ga. 179.

The cases, it will be seen, are quite unanimous in support of the rule; yet they differ, as has been already seen, in the reasons which they assign. Many of the cases, especially the older ones, apply the criterion of Perkins, that the particular deed under consideration took effect by the delivery of the infant's own hand; and others apply the criterion of Lord Chief Justice Eyre, that the deed did not appear to be to the prejudice of the infant; and in still others, both criterions are adopted. The result might have been otherwise if the deed were executed by an agent appointed by the infant: See *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Philpot v. Bingham*, 55 Ala. 435; *Wamble v. Foote*, 2 Dak. 1; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; but see *Cummings v. Powell*, 8 Tex. 80, 88, per Hemphill, C. J.; *Ferguson v. Houston etc. Ry*, 73 Tex. 347; and see post, "Delegation of Authority"; or if it were a deed of gift: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639; but see *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463; and see post, "Gifts." It is doubtful, however, whether any well-considered case at the present day would adopt these distinctions; but that all deeds of infants would be held to be voidable only, and not void, without regard to the question whether they were executed by the grantors personally or by their agents, or whether they were executed with or without consideration.

The effect of the deed should not be misunderstood. Being simply voidable, the deed operates to transmit the title, which continues in the grantee, or those who claim under him, unless divested by some act of the grantor: *Irvine v. Irvine*, 9 Wall. 617; *Law v. Long*, 41 Ind. 586; *Phillips v. Green*, 5 T. B. Mon. 344; *Van Nostrand v. Wright*, Hill & D. Sup. 260; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253; *Ihley v. Padgett*, 27 S. C. 300, 302; *White v. Flora*, 2 Over. 426, 431; *Matherson v. Davis*, 2 Cold. 443, 451. And hence it has been held that the grantee who takes possession of the premises under the deed does so rightfully, and consequently the grantor is not at liberty to treat him as a trespasser, until, by avoiding the deed, he places him in that position; and speaking of the old action of ejectment, the court saying: "The action of ejectment necessarily supposes the defendant to be a trespasser, and we are of the opinion that it cannot be maintained in a case like the present without a previous act on the part of the plaintiff's lessor, avoiding the deed made by him while an infant, and under which the defendant is in possession": *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; but see post, "Disaffirmance by Suit." The operation of the deed was well stated by Lane, J., in *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 253: "To us it appears that the word 'voidable,' *ex vi termini*, shows that such a deed transmits the title; and that after vesting, it continues in the grantee until divested by some act of the maker of the deed"; and in *Ihley v. Padgett*, 27 S. C. 300, 302, McGowan, J., says: "From its very nature, a thing only voidable needs no positive confirmation, but stands good until impeached by a proper party. In the first instance, confirmation has no proper application to it; but when there is an effort to avoid the act, it becomes important to inquire whether there has been confirmation; for if so,

the matter has passed beyond the control of the party, and is no longer voidable."

Under the theory that the appointment of an agent by an infant is void, it has been asserted that a deed executed on behalf of an infant, pursuant to an authority conferred by him for that purpose is void, and not merely voidable: *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Philpot v. Bingham*, 55 Ala. 435. But the better view is to the contrary: *Cummings v. Powell*, 8 Tex. 80, 88; *Ferguson v. Houston etc. R'y*, 73 Tex. 344, 347; *post*, "Delegation of Authority."

It may be here observed that there are some deeds of infants which are not even voidable, but on the contrary, cannot be attacked for nonage. In the language of the supreme court of the United States, "They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do": *Irvine v. Irvine*, 9 Wall. 617, 626. In fact, *Zouch v. Parsons*, 3 Burr. 1794, was really such a case, and Lord Mansfield cites Co. Lit. 172 a, to the effect that, "generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." This proposition is fully discussed and illustrated *post*, "Acts Which Infant would have been Compelled by Law to do."

But an infant is not estopped from disaffirming his deed, and maintaining an action to recover the land conveyed, by the mere fact that when the deed was executed he appeared and was believed by the grantee to be an adult: *Buchanan v. Hubbard*, 96 Ind. 1. Nor even would he be estopped at law by a false declaration at the time he made the deed or a recital in the deed that he was of full age: See *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676. But it might be otherwise in equity: *Ferguson v. Bobo*, 54 Miss. 121; *Schmitzheimer v. Biseman*, 7 Bush, 298; compare *Sims v. Everhardt*, 102 U. S. 300; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Vallandigham v. Johnson*, 85 Ky. 288. See further on this question, *infra*, "Infant's Concealment or Misrepresentation as to Age."

An infant's deed to secure the repayment of money advanced for necessities is voidable: *Martin v. Gale*, L. R. 4 Ch. D. 428; and see *Akey v. Wilkama*, 74 Tex. 294; but compare *Cooper v. State*, 37 Ark. 421.

A deed takes effect from delivery. Therefore, where a married woman, while an infant, signed and acknowledged, with her husband, a deed of her lands, and authorized him to deliver it, and he delivered it with her consent after she became adult, it was held that such deed could not be avoided by her on account of infancy: *Sims v. Smith*, 99 Ind. 469; 50 Am. Rep. 99.

DEEDS OF INFANT FEMES COVERT. — Where a married woman, who is also an infant, executes a deed conveying her own realty or relinquishing her right of dower in the lands of her husband, in conformity with a statute which provides that married women may convey their lands or release their claims to dower by deeds executed according to certain formalities, or in a prescribed manner, the question has been, not so much whether her deed is void because of her nonage, but whether it is not valid under the statute, notwithstanding her infancy. It is well settled, however, that marriage does not emancipate a person under age from the condition of infancy, and that the statute simply removes the disability of coverture. Hence a deed executed by an infant *feme covert* pursuant to the statutory requirements stands on precisely the same footing as a deed executed by an infant *feme sole*. In other words, the deed is not binding, nor is it void; but it is voidable: *Greenwood v. Coleman*, 84 Ala. 150; *Schaffer v. Lavretta*, 57 Ala. 14; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Hartman v. Kendall*, 4 Ind. 403, 404; *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 59

Ind. 68; *Hoyt v. Swar*, 53 Ill. 134; *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; *Prewitt v. Graves*, 5 J. J. Marsh. 114, 120; *Oldham v. Sale*, 1 B. Mon. 76, 77; *Webb v. Hall*, 35 Me. 336; *Walsh v. Young*, 110 Mass. 396; *Sanford v. McLean*, 3 Paige, 117; 23 Am. Dec. 773; *Boal v. Miz*, 17 Wend. 119; 31 Am. Dec. 285; *Cunningham v. Knight*, 1 Barb. 399; *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Epps v. Flowers*, 101 N. C. 158; *Hughes v. Watson*, 10 Ohio, 127; *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; *Scott v. Buchanan*, 11 Humph. 468; *Matheron v. Davis*, 2 Cold. 443, 451; *Burr v. Wilson*, 18 Tex. 367, 375. The same rule applies to a mortgage of her estate, executed by an infant married woman: *Mages v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196; *Lozey v. Bond*, 94 Ind. 67.

"It is inconceivable," says the court in *Greenwood v. Coleman*, 34 Ala. 150, "that it was designed to confer upon her, when under coverture, an authority to contract which did not pertain to her if sole and unmarried, and to dispense with the disability of infancy." In *Sanford v. McLean*, 3 Paige, 117, 121, 23 Am. Dec. 773, 775, Chancellor Walworth uses the following language: "The statute which makes valid the deed of a *feme covert* when executed with her husband, and acknowledged by her on a private examination, was never intended to sanction or validate a conveyance by an infant wife. There is a plain and obvious distinction between the disability of coverture and that of infancy. The first arises from a supposed want of will, on account of the legal power and coercion which the husband may exercise over the volition of the wife. This disability is removed by the private examination of the wife in the absence of her husband, by which it is legally ascertained that such power and coercion have not been exercised in that particular case. But the disability of infancy arises from the supposed want of capacity and judgment in the infant to contract understandingly." Again, Buskirk, C. J., says, in *Scranton v. Stewart*, 52 Ind. 68, 91: "The infancy of the plaintiff presents a distinct question from that of her coverture. Each disability must be considered by itself, and neither can derive any additional force from being coupled with the other. Under our statute, a *feme covert* cannot convey her lands unless her husband joins with her in the deed, and unless the deed is executed in the mode prescribed by the statute; and when a deed is thus executed, the disability of coverture is removed, and that of infancy alone remains. The deed of a married woman is void when the statutory requirements are not complied with. The deed of an infant, whether married or unmarried, is not void, but voidable merely."

In *Sherman v. Garfield*, 1 Denio, 329, where an infant *feme covert* joined with her husband in a conveyance of his lands, purporting to release her dower therein, it was held that her conveyance was void, she having no estate in the lands, and that, having survived her husband, she could maintain an action to recover her dower, notwithstanding her conveyance; the court saying: "Here the land belonged to the plaintiff's husband, and she had no estate or interest in it, but only a capacity to be endowed in the event she should survive him. There was nothing upon which the deed could operate. It was therefore merely void, and required no act on her part to disaffirm it." It is thus plain that this questionable decision was made to rest on other grounds than nonage. In an earlier case in the same state, also involving a release of dower by an infant *feme covert*, it was said that the deed was void for infancy; but what the chancellor must have meant was, that it was voidable; at least it was unnecessary to hold that it was anything more than voidable, since the question was simply as to the right of the infant to disaffirm the deed and recover her dower in the lands: *Sanford v. McLean*, 3

Paige, 117; 23 Am. Dec. 773. In *Schrader v. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538, the bad report of a case shows that the deed of a *feme covert* executed and acknowledged by her while an infant, but dated after she attained full age, is "absolutely void," that is, may be avoided by her. It is impossible to tell whether the deed was post-dated at the time it was executed, or a blank left for the insertion of the date, which was afterwards filled in; presumably it was the latter. It is, of course, idle to comment on such a case.

The deed of an infant *feme covert* has the same effect, when executed according to the requirements of the statute, as the deed of an unmarried infant. In other words, it operates to vest the title in her grantee, or to relinquish her right of dower, as the case may be, subject to her affirmation or disaffirmance on arriving at full age: *Matherson v. Davis*, 2 Cold. 443, 451; *Law v. Long*, 41 Ind. 586.

In Minnesota, by 1 General Statutes, 1888, chapter 40, section 2, "a husband and wife may convey any real estate by their duly authorized agent or attorney, and may by their joint deed convey the real estate of the wife in like manner as she might do by her separate deed if she was unmarried; nor shall the minority of the wife in any case affect the validity of such deed." In 1843, 1861, and 1866, statutes were passed in Indiana which have been reproduced in 2 Revised Statutes, 1888, sections 2939, 2940, 2943, providing for the joinder of married women under the age of twenty-one years, with their husbands, in conveyances of the real estate of the latter. The first of these statutes provided that "any married woman over the age of eighteen years and under the age of twenty-one years may release and relinquish her right in any lands of her husband, sold and conveyed by him, by executing and acknowledging the execution of such conveyance as provided in the last preceding section, if the father or guardian of such married woman shall declare before the officer taking such acknowledgment that he believes that such release and relinquishment of dower is for the benefit of such married woman, and that it would be prejudicial to her and her husband to be prevented from disposing of the lands thus conveyed." Under this statute it was held that a married woman under the age of eighteen years could not, either with or without the consent of her father or guardian, release or relinquish her dower in the lands of her husband. The father or guardian had no power to give his consent, unless she was over eighteen and under twenty-one years of age: *Law v. Long*, 41 Ind. 586. It was also held, in a suit against a husband and wife to foreclose a mortgage executed by them in 1872, that an answer by the wife that when she executed the mortgage she was an infant, without alleging that the land was her separate property, or that her husband was an infant, was bad on demurrer, since under the statute of 1866 it was competent for an infant wife of an adult husband to join with him in the conveyance of his real estate: *Bakes v. Gilbert*, 93 Ind. 70.

EXECUTORY CONTRACTS TO SELL REAL PROPERTY.—An infant's contract to sell and convey his real estate is not void, but only voidable, and is therefore subject to his affirmation or disaffirmance: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209. The infant may repudiate the contract, and recover back the money paid thereunder; and in such an action the vendor will not be entitled to deduct from the amount of the deposit sued for the expense of advertising and selling the property again, brought about by the plaintiff's rescission of the contract: *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; and see *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." If his vendee is in possession of the land contracted to be conveyed, he may maintain ejectment, it is held, without

giving notice of his disaffirmance of the contract, the action itself being a sufficient disaffirmance: *Clark v. Tate*, 7 Mont. 171. Nor will a court of equity restrain his proceedings at law to recover the lands in the possession of the vendee, his contract being no more binding on him in equity than at law: *Brauner v. Franklin*, 4 Gill, 463. Of course, infancy is a good defense to an action against a vendor to recover damages for his failure to perform his contract: *Yeager v. Knight*, 60 Miss. 730. The contract to sell and convey not being void, but voidable only, his vendee who enters into possession of the land under the contract cannot be regarded as a trespasser, and therefore, upon the disaffirmance of the contract by the infant after arriving at full age, an action of *indebitatus assumpsit* for use and occupation may be maintained against the vendee; and it is held, the action being equitable in its nature, the vendee might recoup for valuable improvements erected by him in good faith upon the land: *Weaver v. Jones*, 24 Ala. 420.

The contract is none the less voidable because it is in the form of a bond for title with a penalty: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Weaver v. Jones*, 24 Ala. 420; *Bozeman v. Browning*, 31 Ark. 364. According to the theory of *Keane v. Boycott*, 2 H. Black. 511, 514, such a contract would be necessarily prejudicial to the infant, and would consequently be void; but Moncre, J., in *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209, says that "the penalty of the bond is a mere matter of form, the substance of the contract being the condition"; and Chilton, C. J., in *Weaver v. Jones*, 24 Ala. 420, affirms that "the better opinion, as maintained by the modern decisions, is, that an infant's contracts are none of them (with perhaps one exception) absolutely void by reason of nonage." See also, *post*, "Bonds."

Under the theory, however, that the appointment of an agent by an infant is absolutely void, it has been held that a bond for title executed by an agent of an infant was void, and consequently could not be ratified by him after attaining majority: *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; and see *Pyle v. Cravens*, 4 Litt. 17; but see the view that an infant's delegation of authority is void criticised *post*, "Delegation of Authority."

PURCHASES OF REAL PROPERTY.—An infant's contract of purchase of real property, whether executory or executed by a conveyance to him, is also simply voidable: *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Baker v. Kennett*, 54 Mo. 82; *Wagner, J.*, in the latter case, saying: "The old distinction between the void and voidable contracts of infants is becoming exploded by the courts, and the tendency of modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the acts and contracts of infants shall be deemed voidable only, and subject to their election, when they become of age, either to affirm or disavow them." If the deed to the infant reserves a lien on the land to the grantor for the purchase-money, it is nevertheless but voidable, and may be affirmed by the infant after he comes of age: *Hook v. Donaldson*, 9 Lea, 56. An infant cannot retain the land purchased by him, and repudiate his agreement to pay the price, or a note and mortgage executed by him as a part of the transaction of purchase to secure the price: See *post*, "Disaffirmance of Part of Transaction."

MORTGAGES OF REAL PROPERTY.—An infant's mortgage of his real estate, whether under the theory that the mortgage operates as a conveyance of the legal title, or under the theory that it operates to create a mere lien upon the land, is likewise merely voidable, at the election of the infant: *Hubbard v. Cummings*, 1 Mo. 11; *Monumental Building Ass'n v. Herman*, 33 Md. 128,

132; *President etc. of Boston Bank v. Chamberlain*, 15 Mass. 220; *Mansfield v. Gordon*, 144 Mass. 168; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Merchants' Fire Ins. Co. v. Grant*, 2 Edw. Ch. 544; *Palmer v. Miller*, 25 Barb. 399; *McGan v. Marshall*, 7 Humph. 121. So, also, if an infant takes a conveyance of land, and contracts therein for the payment of the purchase price, and that the purchase-money shall be a lien on the land, the instrument is not void, but voidable: *Hook v. Donaldson*, 9 Lea, 56. The reasoning by which most of these cases have reached this conclusion has been along the same lines by which many of the cases previously cited have held the deeds of conveyance of infants to be voidable simply; namely, that the instrument in the particular case before the court took effect by the delivery of the infant's own hand, and that it did not appear to be to the prejudice of the infant. Thus in *McGan v. Marshall*, 7 Humph. 121, it was held that a mortgage executed by an infant to secure payment for goods to be purchased, and which were to be paid for in two years, was not, on its face, prejudicial to the infant, and was consequently voidable, and not void, and proof of the subsequent injudicious application by the infant of the consideration received could not render it void. In *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38, Woodbury, J., says that "courts incline to construe infants' contracts voidable rather than void, because such construction oftener promotes public justice, and operates at the same time more beneficially to the minor himself, for whose sole advantage the privilege of avoiding a contract is conferred. As contracts which take effect by manual delivery convey usually an interest, and not a mere power, such, when made by an infant, whether the interest pass to or from him, are, in general, not void, but voidable."

In accordance with the rule that if the contract be such as the court can pronounce prejudicial to the infant it is void, it has been said that a mortgage of her reversionary interest in real and personal estate, executed by an infant *feme covert* to secure a debt due by a firm of which her husband was a member, is absolutely void and incapable of confirmation: *Cronise v. Clark*, 4 Md. Ch. 403; the court using the following language: "It is a contract from which she cannot possibly derive a benefit, and which the court cannot fail to see and pronounce to be to her prejudice. It must therefore be regarded as merely void and incapable of confirmation." The facts of the case, however, simply involved an inquiry into the right of the infant to avoid the mortgage. In *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686, the court also asserted that a mortgage given by an infant *feme covert* to secure the debt of her husband was absolutely void, and not merely voidable, since it could not be beneficial to her; but here, again, the case only involved the right of the infant to disregard the mortgage and the proceedings taken under it. See further, *post*, "Suretyship."

This reasoning has already been criticised. Modern cases entitled to any respect will undoubtedly reject it, and adopt the simple rule that it is more to the infant's advantage, and his rights are amply protected, if all his general contracts are held to be voidable only, without regard to the question whether they appear to be to his benefit or to his prejudice, or whether they take effect by delivery of his own hand or are executed by means of an agent appointed by him. According to the old theory, if a mortgage were executed by an agent of the infant it would be void, because an infant cannot appoint an agent; but it has been held that a power of sale given to the mortgagee, in a mortgage made by an infant, was voidable only, and a conveyance thereunder might be ratified by the infant: *Askey v. Williams*, 74 Tex. 294; the

court saying: "The great weight of authority is to hold an infant's naked power of attorney void; but the rule is different when the power is coupled with an interest." The court is mistaken in its opinion that "the great weight of authority is to hold an infant's naked power of attorney void." The truth is, "the great weight of authority," although perhaps not the greater number of cases, is to hold them not void, but voidable; or to speak with more exactness, to hold contracts entered into under them, on behalf of the infant, to be voidable instead of void: See *post*, "Delegation of Authority."

The mortgage being voidable, the defense of infancy is, of course, good in a suit to foreclose it; but a subsequent lien-holder cannot join in the defense: *Bullwin v. Rosier*, 1 McCrary, 384; and if a bond and mortgage be given by an infant, it is held that equity will, in a suit for that purpose by his personal representatives, order the same to be delivered up and canceled, and decree a perpetual injunction against all proceedings thereon at law: *Colcock v. Ferguson*, 3 Desaus. Eq. 482. If, also, an infant purchases real estate, and agrees, as a part of the consideration, to pay off a mortgage thereon, an action cannot be maintained on the agreement to pay off the mortgage, unless the agreement be ratified by the infant after he attains his majority: *Walsh v. Powers*, 43 N. Y. 23, 26, 27; 3 Am. Rep. 654, 655.

The mortgage of her lands executed by an infant *feme covert* pursuant to statutes which confer the power upon married women to convey or encumber their real estate, as has already been said, is not binding, nor is it void, but it is voidable: *Magee v. Welsh*, 18 Cal. 155; *Dixon v. Merritt*, 21 Minn. 196; *Losey v. Bond*, 94 Ind. 67; see *ante*, "Deeds of Infant Females Covert."

The deed of an infant to secure the repayment of money advanced for necessities is voidable: *Martin v. Yale*, L. R. 4 Ch. D. 428; and see *Askey v. Williams*, 74 Tex. 294; but in one case a deed of trust to secure indebtedness, executed by a minor, was, with doubtful correctness, held valid and binding to the extent that it was for necessities: *Cooper v. Stute*, 37 Ark. 421.

An infant's mortgage, like his deed of conveyance or other contract, is valid until disaffirmed by the infant: *Palmer v. Miller*, 25 Barb. 399; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. "It requires no affirmative act to continue its validity," says Martin, C., in the last case, "but only an absence of any disaffirming acts. It remains valid in all respects, like the deed of an adult, until it has been disaffirmed by the maker after reaching his majority."

LEASES — LIABILITY FOR RENT. — The question as to the binding effect of a lease to which an infant is a party may arise where he is the lessor and where he is the lessee. It is a little singular that the cases discussing the question are so few in number; and it may be remarked that what there are involving the validity of a lease to him, or rather his liability for rent, leave the subject in quite an unsatisfactory condition. In the first place, it is held that an infant's lease of his lands, reserving rent, is not void, but voidable only: *Slator v. Trimble*, 14 Ir. C. L. 342 (1861); and notwithstanding the rent reserved was not the best obtainable: *Slator v. Brady*, 14 Ir. C. L. 61 (1863); Fitzgerald, B., saying in the latter case: "Doubtless some acts of an infant are absolutely void, while some are voidable only. According to some authorities, the criterion of the distinction is this: If the act *may* be for the benefit of the infant, it is voidable only; if it *cannot* be for his benefit, it is void. According to others, it is said to be this: All such gifts, grants, or deeds as do not take effect by the delivery of the infant's hand are void; but those which do take such effect are voidable only. It is unnecessary to de-

termine which of these is the more correct. By adopting either, it seems to me the result will be that the act in question here is voidable only." The learned baron reached the right result; but he should have said that neither criterion was correct. It has, however, been said that "if an infant appoints a person to make a lease, it does not bind the infant; neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act": Baron Parke in *Doe ex dem. Thomas v. Roberts*, 16 Mees & W. 778, 781; but see the view that the appointment of an agent by an infant is void criticised *infra*, "Delegation of Authority."

In regard to leases made to infants, it has been held in this country that such a lease was not void, but voidable only, and therefore a third person could not attack it on the ground of infancy, in an action in which the lease was drawn into question: *Griffith v. Schwenderman*, 27 Mo. 412; and again, where infants gave a written agreement to pay rent, a plea of infancy to an action thereon was good: *Flemer v. Dickerson*, 72 Ala. 318. In this latter case, the action was commenced before the infants attained their majority, and before the expiration of the term. In *Maddon v. White*, 2 Term Rep. 159, 161, Justice Buller is reported as saying that "all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit"; by which indefinite remark we may understand either or both of two things; namely, that if the premises leased are a necessary, the lease is binding to the extent, at all events, that he must pay a reasonable rent for their use; and although the premises are not a necessary, yet if the rent be no more or less than the use of the premises is fairly worth, he is bound by the lease, at all events to pay for the rent earned.

Justice Buller's dictum was probably based on a much-discussed case, variously reported as *Kelsey's Case*, Cro. Jac. 320; *Ketley's Case*, 1 Brownl. 120; and *Kirtan v. Elliott*, 2 Bulst. 69. The reports of the case differ about as much as its name, but the following is a fair statement of them all: On demurrer to a plea of infancy in debt upon a lease, it was held that the lease was voidable only, at the election of the infant; for if it were for his benefit, it was not void, but the infant, at his election, might make it void, by refusing and waiving the land before the rent day came; but it was not shown that the rent was of greater value than the use of the land, and the defendant was of full age before the rent day came, and therefore it was adjudged for the plaintiff.

Four interpretations of this case are possible: 1. That an estate vests in the infant on his entry under the contract of tenancy, and renders him liable to the obligation to pay rent until he repudiates the estate, which he might do either within age, and after as well as before the rent day came, or on coming of age before the arrival of the rent day; 2. That the infant who enters into the possession and enjoyment of the estate may repudiate the letting at any time before the rent day came, but could not do so afterwards so as to relieve himself from the obligation to pay the rent due, notwithstanding his infancy; 3. That the premises were a necessary, and therefore the infant was liable for the rent, which did not appear to be unreasonable; and 4. That the infant ratified the lease by his acquiescence and retention of possession after he arrived at full age, and before the rent day came. We are inclined to believe that the case was decided on the last ground, but some authorities claim that it was decided on the first or second. Thus in *Leeds etc. Ry v. Fearnley*, 4 Ex. 26, which was an action for calls on railway shares, to which the defendant pleaded that at the time of making the calls,

and also at the time he became the holder of the shares, he was an infant, Baron Parke said: "This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a property in the possible profits of the concern. Now, according to *Ketsey's Case*, Cro. Jac. 320, and what is more distinctly laid down by Dodderidge, J., in *Kirtton v. Elliott*, 2 Bulst. 69, he would be liable, unless he repudiated; then ought not the plea to aver that fact?" In *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, Baron Parke again gives his explanation of the case: "We collect that the principle upon which the court decided was, that every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bacon's Abridgement, title Infancy, I., 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord Ellenborough, in *Baylis v. Dinely*, 3 Maule & S. 481, intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle that as the estate vests, as it certainly does, the burden upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority."

The question of the liability of the infant for rent was actually involved in two Irish cases. In *Kelly v. Coote*, 5 Ir. C. L. 469, it was held that where an estate on which rent was reserved was cast upon an infant by operation of law, and he had not disaffirmed, he became liable for rent, notwithstanding his infancy. "Nothing is clearer than this," it was said; "that where an infant becomes entitled to property subject to a certain burden, the obligation to discharge that burden also vests in him." And in *Blake v. Concannon*, 4 Ir. Rep. C. L. 323, it was decided that an infant lessee who enters into possession and enjoyment of the land is liable for an installment of rent coming due during such holding, and while he is an infant, if he fails to repudiate the contract of tenancy, and the tenancy under it, before the installment falls due; but, on the other hand, he is not liable for an installment of rent falling due after such repudiation; the reason being, as expressed by Pigot, C. B.: "He is not, in an action of debt for the rent, held liable upon the contract of tenancy alone. His liability arises from his occupation and enjoyment of the land under the tenancy so created. If his liability arose from the contract alone, the repudiation of the contract, by annulling it, would annul its obligations, which would then exist only by reason of the contract. But the infant, though he can repudiate the contract of demise, and the tenancy under it, and can so re-vest the land in the landlord, cannot repudiate an occupation and enjoyment which are past, or restore to the landlord what he has lost by that occupation and enjoyment of the infant." *Ketsey's Case*, Cro. Jac. 320, was explained as intending that an occupation and enjoyment of the infant until after the rent became payable would render the infant liable, independently of the fact that the defendant was of full age before the rent day came; and the *dictum* of Baron Parke in *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, to the effect

that the avoidance by the infant could take place after the rent (calls) became due, was disapproved.

While we do not agree with Baron Parke as to the ground on which *Ketsey's Case* was decided, yet we believe that his views as to the liability of an infant for rent, as expressed in *Northwestern Ry v. McMichael*, 5 Ex. 114, 126, are nearer correct than those of Chief Baron Pigot in *Blake v. Concannon*, 4 Ir. Rep. C. L. 323. There is no doubt that the infant's contract of tenancy is good; that an estate vests in him by his entry under the contract; and that the contract and estate continue until avoided by him. The tenancy may be ratified by him after he arrives at full age, when it would no longer be subject to his disaffirmance; and it may be ratified by his continuing in possession and enjoyment of the estate after he comes of age. He could not hold the estate, and repudiate his obligation to pay rent. In the event of such a ratification he would be liable for rent falling due thereafter; and since the ratification would render the letting valid from the beginning, he would also be liable for rent which became due during his infancy. But we fail to appreciate the force of any argument which holds the infant liable, notwithstanding his infancy, for rent falling due during his infancy, if he fails to repudiate the tenancy before the pay day arrives. It is true that the infant may have received a benefit from the occupation and enjoyment of the land, and that a restoration of the land to the lessor will not restore to him what he has lost by the occupation and enjoyment of the infant, yet it does not follow, according to the best authorities, that because the infant has received a benefit from his contract, and that a disaffirmance will not restore the other party to his original position, the infant is bound by his contract.

In *Lemprière v. Lange*, L. R. 12 Ch. D. 675, it was held that where an infant obtained a lease of a furnished house on an implied representation that he was of full age, the lease would be declared void and canceled at the suit of the lessor, and possession of the house ordered to be given up, and the defendant restrained by injunction from parting with the furniture; but that the defendant was not liable for use and occupation.

An infant may be liable for use and occupation of a dwelling, if it be a necessary: See *Crisp v. Churchill*, cited 1 Bos. & P. 340; *Low v. Griffith*, 1 Scott, 458; 1 Hodges, 30.

It was held in an old case, under the benefit and prejudice theory, that the surrender of an infant lessee by the acceptance of a new lease was void, if it be without increase of his term or decrease of his rent; for where there was not an apparent benefit, or semblance of benefit, his acts were void: *Lloyd v. Gregory*, Cro. Car. 501.

In an action of ejectment against an infant, the defendant is not estopped, by his contract of tenancy with the plaintiffs, from showing title in himself and others, and out of the plaintiffs: *McCoon v. Smith*, 3 Hill, 147; 38 Am. Dec. 623.

MECHANICS' LIENS. — A number of cases have decided that a mechanic's lien cannot be claimed on the land of a minor, against his objection of infancy, by one who has done work and furnished materials under a contract with him: *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572; *Hall v. Acken*, 47 N. J. L. 340; *Atvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418; *Wornock v. Loar*, 88 Ky. 000. "A lien implies a contract, and as an infant cannot make a valid contract, no lien can be obtained against his property": *Atvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. "The lien given by the mechanic's lien law is, except in the case of the land of married women, as to which there is an express provision for lien, incident only to a legal liability to pay which a minor is not competent

to incur for building upon his land": *Hall v. Acken*, 47 N. J. L. 340. "If the contract ceases to be binding, the lien necessarily fails. . . . A conveyance or mortgage by an infant of his real estate would not be binding upon him, and the legislature certainly never intended to allow him to encumber his property indirectly by a contract for its improvement, when he cannot do the same thing in a binding mode by an instrument executed expressly for the purpose. . . . The mechanic who erects a building must take, like all other persons, the responsibility of ascertaining that he is contracting with a person who has reached the requisite age": *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. These cases, therefore, decided that the particular mechanic's lien laws in question did not confer a lien on the property of infants. It would undoubtedly be competent, however, for the legislature to provide that the lien could be so claimed.

One to whom land has been conveyed, against which a mechanic's lien for materials furnished is sought to be enforced, may, after the grantor has disaffirmed the contract on the ground of infancy, avail himself of the disaffirmance in defense; and this, it is held, although the contract was disaffirmed by the grantor by a plea of infancy in the same action: *Price v. Jennings*, 62 Ind. 111.

MARRIAGE SETTLEMENTS. — There was at one time considerable dispute in the English courts as to whether a jointure settled on an infant wife before marriage was a bar of dower. It was finally settled, however, that the infant was bound at law by a legal jointure under the statute of 27 Henry VIII., chapter 10, and that an equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the parent or guardian of the infant before marriage, would, in analogy to the statute, constitute an equitable bar: See *Harvey v. Ashley*, 3 Atk. 607, 612, per Lord Hardwicke; *Earl of Buckinghamshire v. Drury* (*Drury v. Drury*), 2 Eden, 60; 4 Bro. C. C. 506, note, 3 Bro. P. C. 492, Wilm. Op. 177; *Williams v. Williams*, 1 Bro. C. C. 152; *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *Simpson v. Gutteridge*, 1 Madd. 609; *Williams v. Chitty*, 3 Ves. 545; *Smith v. Smith*, 5 Ves. 189; *Corbet v. Corbet*, 1 Sim. & S. 612; 5 Russ. 254; *McCartee v. Teller*, 2 Paige, 511. The leading case of *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 4 Bro. C. C. 506, note, 3 Bro. P. C. 492, Wilm. Op. 177, established that the statute of Henry VIII. applied to infants as well as adults, and that a jointure was not a contract, but a provision made by the husband for the wife. As before remarked, to make an equitable jointure binding on the infant wife, the provision should be beneficial to her and certain, and not precarious and uncertain. Furthermore, she will not be bound by her agreement to accept a pecuniary consideration, instead of an interest in land, in lieu of dower: *Shaw v. Boyd*, 5 Serg. & R. 309; *Drew v. Drew*, 40 N. J. Eq. 458. "As the *feme* must have a freehold, there is no reason to say a gross sum, which was to be received as a consideration for having executed a bond, shall be considered as a provision settled on the *feme* in lieu of dower": *Shaw v. Boyd*, 5 Serg. & R. 309. In Michigan, it is provided that "a woman may also be barred of her dower in all the lands of her husband, by a jointure settled on her with her assent before the marriage, provided such jointure consists of a freehold estate in lands for the life of the wife at least, to take effect in possession or profit immediately on the death of her husband," and that "such assent shall be expressed, if the woman be of full age, by her becoming a party to the conveyance by which it is settled, and if she be under age, by her joining with her father or guardian in such conveyance": 2 Howell's Ann. Stats. 1882, secs. 5746, 5747. A similar statute exists in New York: 4 R. S.

Banks & Bros.' 8th ed., 2455, sec. 9, 10; and perhaps in some other states where dower is recognized. In some states, if the jointure was made when the wife was an infant, she may, after her husband's death, waive her jointure and demand her dower: New Jersey R. S. 1877, 322, sec. 10; Ohio R. S. 1890, sec. 4189.

With respect to the settlement of her own real and personal estate by a female infant upon her marriage, it also became established, after some fluctuation of opinion, that she was bound by the settlement of her general personal property, because such personalty became by the marriage the property of her husband, and the settlement was in effect his settlement, and not hers; but as to her real estate and also her personal property settled to her separate use, she was not bound, although the settlement was made with the approbation of her parents or guardian, or even the court of chancery: See *Harvey v. Ashley*, 3 Atk. 607, 613, per Lord Hardwicke; *Durnford v. Lane*, 1 Bro. C. C. 106, 115; *Clough v. Clough*, 5 Ves. 710, 717; *Milner v. Lord Harewood*, 18 Ves. 259, 275; *Simson v. Jones*, 2 Russ. & M. 365; *Johnson v. Johnson*, 1 Keen, 648; *Campbell v. Ingilby*, 21 Beav. 567; *In re Waring*, 21 L. J. Ch. 784; *Field v. Moore*, 25 L. J. Ch. 66; *Temple v. Hawley*, 1 Sand. Ch. 153; *Wetmore v. Kissam*, 3 Bosw. 321; *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Tabb v. Archer*, 3 Hen. & M. 398; 3 Am. Dec. 657; *Healy v. Rowan*, 5 Gratt. 414; 52 Am. Dec. 94; *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 385; *Whitchote v. Lyle's Ex'rs*, 28 Pa. St. 73. This rule is nowhere better expressed than in *Simson v. Jones*, 2 Russ. & M. 365, by Sir John Leach, M. R., who says, at page 376: "The general personal estate of a female infant is bound by a settlement made on her marriage, because such personal estate becomes by the marriage the absolute property of the husband, and the settlement is, in effect, his settlement, and not hers. It is now established that the real estate of a female infant is not bound by the settlement on her marriage, because her real estate does not, by the marriage, become the absolute property of the husband, although by the marriage he takes a limited interest in it"; and again, he says, page 377: "Whatever doubts may have been entertained on the subject formerly, I take it to be clear that the real estate of a female infant would not be bound by a settlement made with the approbation of the court; and it appears to me to follow that the same principle is applicable to personal estate settled to her separate use." If she is not a party to the marriage articles, but they are entered into between her guardian and her intended husband, they are of no obligatory force upon her: *Healy v. Rowan*, 5 Gratt. 414; 52 Am. Dec. 94.

It may be, however, that she will not be permitted to disaffirm her voidable settlement because of infancy, during coverture, and perhaps not after issue born, on the ground that it might interfere with the rights of the husband and of the issue: See *Milner v. Lord Harewood*, 18 Ves. 259, 275; *Temple v. Hawley*, 1 Sand. Ch. 153, 168; *Wetmore v. Kissam*, 3 Bosw. 321; *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Tabb v. Archer*, 3 Hen. & M. 398; 3 Am. Dec. 657. But she may affirm the settlement during coverture, after she becomes of age: *Temple v. Hawley*, 1 Sand. Ch. 153, 168, and in *Durnford v. Lane*, 1 Bro. C. C. 106, 115, the lord chancellor remarks: "If she had a settlement from her husband, and after his death she had taken possession of it, I think she would be bound by the equity arising from her own act"; that is, she would thereby affirm her settlement.

A male infant who marries an adult female, and unites with her in a settlement by which she covenanted that her estate should be settled to certain uses, is bound by her covenant: *Slocombe v. Glubb*, 2 Bro. C. C. 545; the lord

chancellor saying: "It is not necessary to discuss the other question, how far the infant husband could be bound by his own contract; for I go upon the covenant of the wife, who was adult. And the husband's covenant operates no more than to show his concurrence, and to take away every imputation of fraud from the transaction." But a settlement of his property executed by a male infant is not binding upon him; and notwithstanding he falsely represented to the solicitor, before executing the instrument, that he was of age, it appearing that the intended wife knew that he was not of age, and therefore was not deceived: *Nelson v. Stocker*, 4 De Gex & J. 458.

An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, can only be made, as a general rule, by the parties themselves, the instrument being merely voidable, and not void, at their election. It cannot therefore be avoided for nonage by the trustee acting under it, especially when a court of equity is asked to compel him to render an account: *Jones v. Butler*, 30 Barb. 641; nor by the creditors of the infant's son, whom the infant left surviving her: *Lester v. Fraser*, 2 Hill Eq. 529; *Riley Eq. 76*; but it may be avoided by the infant's privies in blood, after her death: *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 365. See further, as to who may avoid an infant's contract, *post*, "Who may Take Advantage of Infancy."

In England, the Infants' Settlements Act, 1855, 18 and 19 Victoria, chapter 43, provides that an infant above a certain age may, with the approbation of the court of chancery, make a valid settlement, or contract for a settlement, of his or her property. See, as interpreting this statute, *In re Dalton*, 6 De Gex, M. & G. 201; *In re Strong*, 2 Jur., N. S., 1241; *Powell v. Oakley*, 34 Beav. 575. In Georgia, section 1784 of the code (1882) enacts: "The minority of either party to marriage articles, or a marriage contract, shall not invalidate it; provided such party is of lawful age to contract marriage"; and section 2734 reads: "Marriage contracts and settlements made by infants, but of lawful age to marry, are binding as if made by adults." In Texas, the statute of 1840 giving validity to the marriage settlements of minors was held not to further remove the disabilities of married infants to enter into contracts: *Burr v. Wilson*, 18 Tex. 367, 374.

SALES, EXCHANGES, AND ASSIGNMENTS OF PERSONAL PROPERTY. — There can be no doubt, in the light of the foregoing discussion, that an infant's sale or exchange of his chattels, or his assignment of a thing in action, is not void, but voidable only: *Holmes v. Rice*, 45 Mich. 142; *Williams v. Brown*, 34 Me. 594; *Kingman v. Perkins*, 105 Mass. 111; and see *post*, "Bills and Notes," as to his transfer of commercial paper. And as in the case of an infant's deed of conveyance, or any other contract, as heretofore seen, his sale of goods is valid until rescinded by him: *Badger v. Phinney*, 15 Mass. 359, 363; 8 Am. Dec. 105, 108. In an English *nisi prius* case there is, however, an expression of opinion to the effect that the contract of a sale of an infant is absolutely void, and is no answer to an action of trover brought by the infant to recover the value of the goods: *Latt v. Booth*, 3 Car. & K. 292. The report does not disclose whether there was a demand for the goods before the action was brought. If there was, it was unnecessary to hold the sale to be void. In some early New York cases it will also be found stated that a sale of chattels by an infant vendor is absolutely void, if the infant do not deliver the goods with his own hand; for an infant could not appoint an agent to make delivery for him: *Stafford v. Roof*, 9 Cow. 628, 627; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77; but see *post*, "Delegation of Authority."

A sale not being void, but voidable only, at the election of the infant, it

is not within the power of a stranger, certainly not of a wrong-doer, to set up the infant's incapacity to contract as a protection to himself: *Holmes v. Rice*, 45 Mich. 142. Nor can an assignment of a debt by an infant be avoided by his creditors on the ground of nonage: *Kingman v. Perkins*, 105 Mass. 111. See further on this question, who may take advantage of infancy, *post*, "Who may Take Advantage of Infancy."

It is no defense, it may be noticed, to an action by an infant to recover the possession of property exchanged by him, or damages for its conversion, based upon his rescission of the contract, that the property received by him in exchange had depreciated in value while in his hands, through his misuse of it, or otherwise: *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210; and see *Carpenter v. Carpenter*, 45 Ind. 142; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *contra*, *Bartholomew v. Finnemore*, 17 Barb. 428.

An infant's contract of sale or exchange is not rendered binding upon him at law from the fact that he fraudulently represented himself to be of full age at the time he entered into the contract, and the other party relied upon such representation: *Norris v. Vance*, 3 Rich. L. 164; *Carpenter v. Carpenter*, 45 Ind. 142. See *post*, "Infant's Concealment or Misrepresentation as to Age."

WARRANTIES IN SALES AND EXCHANGES OF PERSONAL PROPERTY. — An infant's contract of warranty on the sale of a chattel by him is also undoubtedly voidable. Of course, no action on the warranty can be maintained against his objection of infancy. Therefore infancy is a good defense to an action on a warranty of soundness of a horse: *Howlett v. Harwell*, 4 Camp. 118. And it is well settled that infancy is a good bar even to an action founded on a false and fraudulent warranty, whether the action is in form *ex delicto* or *ex contractu*: *Green v. Greenbank*, 2 Marsh. 485; *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235; *Morrill v. Aden*, 19 Vt. 505; *Hewitt v. Warren*, 10 Hun, 560; *contra*, *Word v. Vance*, 1 Nott & McC. 197; 9 Am. Dec. 683; and see *post*, "Torts of Infants Connected with Contracts."

CHATTEL MORTGAGES. — The chattel mortgage of an infant is likewise only voidable, and not void: *Cogley v. Cushman*, 16 Minn. 397; *Hangen v. Hackmeister*, 17 Jones & S. 34. Being simply voidable, the mortgage is good until disaffirmed by him: *Cogley v. Cushman*, 16 Minn. 397; *State v. Plaisted*, 43 N. H. 413; although the latter case gives as the reason why it is binding until it is avoided, that it is an executed contract; the court saying: "If the mortgage of the infant were to be regarded as an executory contract, it would be invalid until it was ratified; and if it is deemed an executed contract, it is binding until it is avoided." See this theory criticised *supra*, "Void and Voidable." It follows that all acts done under the mortgage by the mortgagee, and in accordance with the terms of the mortgage, are lawful; and therefore it is held the taking of the property by the mortgagee, as provided by the mortgage, on default made in its conditions, before the mortgage is rescinded by the mortgagor, is lawful, and to maintain an action against the mortgagee for the conversion of the property, it is necessary to allege a demand and refusal: *Cogley v. Cushman*, 16 Minn. 397. So where the plaintiff, while an infant, procured the defendant to sign a note for him, and turned over to the defendant certain property as security, with license to take away the property when he pleased, he cannot maintain trespass for the defendant's taking it away, where he had not previously avoided the contract concerning it, the contract being voidable, and not void: *Hoyt v. Chapin*, 6 Vt. 42. But in *Chapin v. Shafer*, 49 N. Y. 407, it was held that where an infant

mortgaged personal property, but never delivered possession to the mortgagees, the latter would be trespassers in taking the property, after the mortgage became due, from one to whom the infant subsequently, and before coming of age, sold the property. The reasoning in this case is a relic of the old theory that unless there was a delivery by the infant's own hand, a sale, or other similar transaction, was absolutely void. We think the case can better be supported because of the fact that the mortgage had been disaffirmed by the infant by his sale, before the mortgagees had taken possession, and hence after disaffirmance they had no right to take the property under their mortgage, which was then void.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.—An assignment for the benefit of creditors, made by an infant, is also at most merely voidable, at the election of the infant: *Yates v. Lyon*, 61 N. Y. 344; *Soper v. Fry*, 37 Mich. 236. It can be avoided only by the infant, or some one entitled to stand upon his rights. Third persons, even the creditors, cannot disregard it or claim to avoid it on account of the infancy: *Id.* Nor is an assignment made by copartners fraudulent and void in law because one of the assignors is an infant, under the rule that the assignment did not devote the property of the debtors absolutely to the benefit of the creditors; and where the infant has ratified the assignment after coming of age, no fraud in fact can be claimed because of the infancy: *Yates v. Lyon*, 61 N. Y. 344.

PURCHASES OF PERSONAL PROPERTY.—There is no doubt that an infant's purchase of personal property, not a necessary, is simply voidable, and not void, and is therefore capable of ratification by him: *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, 54. On the other hand, he may rescind the contract of purchase, and recover back the purchase-money paid by him, at least where he restores, or offers to restore, the property which he has received under the contract, to the seller: *Riley v. Mallory*, 33 Conn. 201; *Robinson v. Weeks*, 56 Me. 102; *Cooper v. Ailpont*, 10 Daly, 352; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; *McCarthy v. Henderson*, 138 Mass. 310. And in such an action the vendor will not be entitled to recoup for the use of the property while in the possession of the minor: *McCarthy v. Henderson*, 138 Mass. 310; and the infant's right of recovery will not be affected by the fact that the property sold had depreciated in value while in his possession, by reason of use or otherwise: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; and see also, in case of exchanges, *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *White v. Branch*, 51 Ind. 210; *Carpenter v. Carpenter*, 45 Ind. 142; *contra*, *Bartholomew v. Finnmore*, 17 Barb. 428; but see, on the proposition that the money paid cannot be recovered back by the infant, *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, per Lord Mansfield; *Holmes v. Blogg*, 8 Taunt. 508; 2 Moore, 552; *Wilson v. Kearse*, Peake Ad. Cas. 196; *Crummey v. Mills*, 40 Hun, 370; and see further on this question, *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." The sale vests the title to the property in the infant: *Crymes v. Day*, 1 Bail. L. 320. But on disaffirmance by the infant of the purchase, the title reverts in the vendor, who may reclaim the goods from the infant, if he still have them: *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Boyden v. Boyden*, 9 Met. 519, 521; *Strain v. Wright*, 7 Ga. 568; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; see *post*, "Adult's Right to Recover back Consideration from Infant on Disaffirmance." If the infant claims to retain the property purchased, he should, on the plainest principles of justice, be compelled to pay

the price, or answer to any security which he may have given therefor: See *post*, "Disaffirmance of Part of Transaction."

An infant's purchase of personal property is not rendered binding upon him, either at law or in equity, from the fact that he traded as an adult and the vendor dealt with him on that supposition: *Carpenter v. Pridgen*, 40 Tex. 32, 35; *Folds v. Allardt*, 35 Minn. 488, 489; *Stikeman v. Dawson*, 1 De Gex & S. 90. Nor will he be estopped from avoiding the contract at law because of his false representations concerning his age, his means of payment, and the like, on which the vendor relied: *Brown v. McCune*, 5 Sand. 224; *Studwell v. Shapter*, 54 N. Y. 249; *Vinsen v. Lockard*, 7 Bush, 458; *Carpenter v. Carpenter*, 45 Ind. 142; *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412; see further on this question, *post*, "Infant's Concealment or Misrepresentation as to Age."

If goods sold to an infant are delivered to a carrier by the vendor, addressed to the purchaser, while the latter is still under age, but they do not reach him until he has attained full age, infancy is a good defense to an action brought against him for the price, since when the goods were delivered to the carrier the property vested in the infant: *Griffin v. Langfield*, 3 Camp. 254. An officer selling property at public auction is not bound to receive the bid of an infant, since the infant is incapable of making a binding contract. And therefore, where an infant bid a certain sum for the property, and the officer, without regarding his bid, struck it off to another person for a less sum, the officer is not liable for the difference between the bids: *Kinney v. Showdy*, 1 Hill, 544.

As to the binding effect of an infant's note given for the purchase price of personal property, see *post*, "Bills and Notes"; the validity of a chattel mortgage given by the infant on the property purchased to secure the price, see *ante*, "Chattel Mortgages"; an infant's liability for goods supplied him for trading purposes, see *post*, "Trading Contracts"; and as to his obligation to pay for necessities furnished him, see *post*, "Necessaries." It may be here noticed that in an action for goods sold and delivered to an infant, it is not presumed that they were necessities, but that fact must be specially shown: *Ive v. Chester*, Cro. Jac. 560.

TRADING CONTRACTS — BANKRUPTCY OF INFANT. — The question has been discussed in several early English cases as to whether an infant could incur any liability as a trader. In the first place, it has been held that he cannot be charged, as against his defense of infancy, with goods purchased by him to trade with: *Whittingham v. Hill*, Cro. Jac. 494; *Whywall v. Champion*, 2 Strange, 1083; nor for work and labor done for him in the course of his trading business: *Dilk v. Keighley*, 2 Esp. 480; although he thereby gains his living: *Whittingham v. Hill*, Cro. Jac. 494; *Dilk v. Keighley*, 2 Esp. 450. These cases do not really hold an infant's trading contracts to be void, yet they appear to have furnished the ground for the opinion entertained in *Thornton v. Illingworth*, 2 Barn. & C. 824, 4 Dowl. & R. 545, in which Bayley, J., is reported to have said (2 Barn. & C. 826): "In the case of an infant, a contract made for goods for the purposes of trade is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts. If he makes a promise after he comes of age, that binds him on the ground of his taking upon himself a new liability, upon a moral consideration existing before; it does not make a legal debt from the time of making the bargain." There is nothing peculiarly vicious about such a contract; and it was correctly held in *Warwick v. Bruce*, 6 Taunt. 118, affirming 2 Maulo & S. 205, that the contracts of an infant might be avoided or not, at his option,

and this was true of his trading contracts, which were not void; and therefore the infant might maintain an action for the breach of such a contract. Of course, the infant would be liable, in any view, for so much of goods supplied to him to trade with as were consumed as necessities in his own family: *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693. That an infant is not rendered liable on his contracts at law from the mere fact that he traded as an adult, see *Miller v. Blankley*, 38 L. T. 527; *post*, "Infant's Concealment or Misrepresentation as to Age."

The inquiry is presented in this connection as to whether an infant may be adjudicated a bankrupt or insolvent. Since an infant was not bound by his general contracts, including his trade debts, it was settled under the early English bankrupt acts that he could not, as a rule, be declared a bankrupt with respect to such debts: *Rez v. Cole*, 12 Mod. 243; 1 Ld. Raym. 443; Holt, 360; *Ex parte Sydebotham*, 1 Atk. 146; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Layton*, 6 Ves. 434; *Ex parte Barwis*, 6 Ves. 601; *Ex parte Adam*, 1 Ves. & B. 494; *O'Brien v. Currie*, 3 Car. & P. 283; *Belton v. Hodges*, 9 Bing. 365. But while a commission of bankruptcy could not be supported by a mere trading during infancy (*Ex parte Moule*, 14 Ves. 602), yet it might be otherwise if he represented himself to be of age: *Ex parte Watson*, 16 Ves. 265. And where a bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage, a year before the fiat issued, he had made affidavit that he was then of full age, the petition was dismissed, with costs: *Ex parte Bates*, 2 Mont. D. & D. 337; the court saying: "Admitting the fact that the bankrupt was really not of age when the fiat issued, the affidavit that he made when he married, in which he swore that he was then of age, operates as an estoppel to the present application. This is a stronger case than that of *Ex parte Watson*, 16 Ves. 265, where the bankrupt merely represented that he was of age"; and in *In re Unity etc. Banking Ass'n*, 3 De Gex & J. 63, where an infant had obtained a loan on a representation, which he knew to be false, that he was of age, it was held that a proof for the loan was properly admitted in bankruptcy.

In this country, it seems to be held in a meagerly reported case that an infant might claim the benefit of the bankrupt law of 1841, since an infant was bound to pay certain debts, and the bankrupt law extended its benefits to all persons, without exception, who were in a state of bankruptcy: *In re Book*, 3 McLean, 317; but this case was doubted in *In re Derby*, 8 Nat. Bank Reg. 106, in which it was held that infants, as subjects of either voluntary or involuntary bankruptcy, were not embraced within the provisions of the act of 1867, at least in respect to their general contracts; Blatchford, J., saying: "The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth in a voluntary case, commenced during his infancy, a schedule of his creditors, and idle for them to prove their debts during his infancy; for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority. . . . So in an involuntary case, the property of the infant bankrupt would be taken by the court, injunctions would, after adjudication, be granted against pending suits, a schedule of his creditors would be furnished by the bankrupt, and their debts would be proved to no purpose; for his disaffirmance of the debts after becoming of age would necessitate the restoration to him of his property, without any relief to the creditors." The court then points out further objections arising from the provisions of the act.

So far as state insolvent laws are concerned, it was decided in one case that proceedings in insolvency, *in invitum*, against an infant, who was not repre-

sented by a guardian *ad litem*, might be set aside on a bill in equity brought by a creditor who had an attachment upon the infant's estate, although the creditor's claim was one which might be avoided by the infant on plea and proof of his infancy: *Farris v. Richardson*, 6 Allen, 118. The court said: "We have not deemed it necessary to decide in the present case whether the provisions of our insolvent laws are at all applicable to infants; that is, whether proceedings by or against them can be maintained, if they are duly represented by a *prochein ami* or guardian *ad litem*. In England, it is well settled that an infant cannot be a bankrupt. The reason for the rule is, that the bankrupt acts are intended only for traders, and that an infant cannot be properly deemed a trader, or be declared a bankrupt for debts he is not obliged to pay: *Ex parte Sydebotham*, 1 Atk. 146; *Rez v. Cole*, 1 Ld. Raym. 443; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Barwis*, 6 Ves. 601. There is certainly fair reason to doubt whether the legislature intended to include infants among those entitled to the benefit or subject to the duties and limitations created by the insolvent laws. A discharge in insolvency would not relieve them from debts incurred for necessities; and from all other debts they can be relieved by plea and proof of infancy." Again, in *Winchester v. Thayer*, 129 Mass. 129, 133, Gray, C. J., says: "It has not been decided in this commonwealth whether an infant is subject to proceedings under the insolvent laws. But when in such proceedings instituted by a creditor of a partnership (of which he is a member) he has been represented by a guardian *ad litem*, and after coming of age has expressly ratified the partnership and the proceedings, it is difficult to see how he could afterwards avoid them. And even if he could avoid the proceedings so far as he is concerned, it is quite clear that his copartners, who were of full age when the proceedings were instituted, cannot."

Several cases have been decided in England since the passage of the Infants' Relief Act, which, as has been seen, provides that certain general contracts of infants theretofore voidable shall be void without possibility of ratification. In *Ex parte Kibble*, L. R. 10 Ch. 373, an infant, before the passage of the act, gave a bill of exchange, payable after his majority, for jewelry purchased. After his majority, and after the act came into operation, the creditor obtained judgment by default against the debtor, in an action on the bill of exchange, and then took out a debtor's summons, and on his failing to comply with it, filed a petition for adjudication against him. It was held that the court of bankruptcy would look into the consideration of the judgment; and that if the conduct of the debtor, in allowing the judgment to go by default against him, operated as a ratification of the bill, such ratification was void by the second section of the act, and the petition for adjudication was consequently dismissed. In *Regina v. Wilson*, L. R. 5 Q. B. D. 28, a person was convicted under the debtors' act of 1869, because he had, within four months before the presentation of a bankruptcy petition against him, upon which he was adjudged bankrupt, quitted England, taking with him, with intent to defraud, property exceeding twenty pounds, which ought by law to have been divided amongst his creditors. At the times when he quitted England and when he was adjudged a bankrupt, he was an infant, and the debts proved against his estate in bankruptcy were trade debts, contracted since the passage of the Infants' Relief Act, and it did not appear that any debts for necessities supplied to him existed. It was held that the conviction could not be supported. Miller, J., in *In re Rainey*, 3 L. R. Ir. 459, was of the opinion that since the passage of the Infants' Relief Act the foundation of all exceptions to the general rule that an infant could not be made a

bankrupt were swept away in all cases falling within the provisions of the act; and Bacon, C. J., went to the opposite extreme in *Ex parte Lynch*, L. R. 2 Ch. Div. 227, in holding that notwithstanding the provisions of the act, a debtor who had simply traded while under age could, after he had attained full age, be adjudicated a bankrupt in respect of a trade debt contracted, and upon an act of bankruptcy committed during his infancy; but this latter case was overruled in *Ex parte Jones*, L. R. 18 Ch. Div. 109, where it was held that an infant who had traded could not be adjudicated a bankrupt on the petition of a person who had supplied him with goods on credit for trade purposes, but to whom he had made no express representation that he was of full age, even though he had previously filed a liquidation petition, the proceedings under which had become abortive. Whether, if the infant had expressly represented to the petitioning creditor that he was of full age, an adjudication could be made, was not decided, but there is an expression of opinion in the affirmative.

Finally, it may be observed that whether an infant comes within the scope of bankrupt or insolvent laws is plainly a question of legislative intent.

PARTNERSHIP AGREEMENTS AND TRANSACTIONS. — The question as to the binding effect of the partnership agreements and transactions of infants is one which has a close relation to the subject, just considered, of infants' trading contracts. An infant's contract of partnership is voidable only, at all events to the extent that he, and he alone, at his option, may, subject to the rules governing the matter of ratification and disaffirmance, ratify the contract and thereby render it valid and binding from the beginning, or disaffirm it and escape any personal liability on account of the partnership: *Goode v. Harrison*, 5 Barn. & Ald. 147; *Penn v. Whitehead*, 17 Gratt. 503; 94 Am. Dec. 478; *Dunton v. Brown*, 31 Mich. 182; *Osburn v. Farr*, 42 Mich. 134; *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; *Betts v. Carroll*, 6 Mo. App. 518; *Conklin v. Osborn*, 7 Ind. 553. The contract is good until avoided. Therefore it is held that if an infant contributes certain property to the capital of the firm, his copartner acquires an interest therein which is subject to attachment, unless the contract has been avoided; and the infant by claiming the property in replevin against the attaching officer does not signify his election to avoid the contract, but there must be some act of avoidance before the institution of the suit: *Betts v. Carroll*, 6 Mo. App. 518.

If the infant, after he arrives at full age, ratifies the contract of partnership, he will be liable as a partner to the creditors of the firm for its obligations incurred during his minority: *Penn v. Whitehead*, 17 Gratt. 503; and will subject himself not only to the liabilities of the firm of which he knew when he ratified the contract, but to liabilities about which he may have been entirely ignorant at the time: *Miller v. Sims*, 2 Hill (S. C.) 479. "One partner might bind the other by a contract made without his knowledge, to which he never assented, and by which, on being informed of it, he expressly refused to be bound": *Miller v. Sims*, 2 Hill (S. C.) 479; compare *Crabtree v. May*, 1 B. Mon. 289. The fact that the infant, by the contract of partnership, confers an authority upon his copartner to act as his agent for partnership purposes, is no obstacle to a ratification by the infant of a partnership contract made by the copartner, an infant's appointment of an agent not being void, but voidable only: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; and see *post*, "Delegation of Authority." If the infant partner, after attaining full age, transacts the business of the firm, receives its money, and pays its debts, these acts, unexplained, will amount to a confirmation of the partnership: *Miller v. Sims*, 2 Hill (S. C.) 479. It is held that if an infant acts

as a partner until within a short period of his coming of age, it is his duty to give notice of the termination of the partnership on reaching the age of twenty-one, and if he neglects to do so, he is responsible to persons who thereafter trust his former partner on the credit of the partnership: *Goode v. Harrison*, 5 Barn. & Ald. 147. As in other cases, if a party seeks to hold an infant member of a partnership, against the defense of infancy, on an obligation of the firm, the burden of proof is upon the plaintiff to show that after the infant came of age he affirmed and ratified the obligation: *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28. "Such ratification may be shown either by proof of an express promise to pay the debt, made by the infant after he came of age (which is not claimed in this case), or by proof of such acts of the infant after he became of age as fairly and justly lead to the inference that he intended to ratify the contract and pay the debt": *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28. The ratification will not be inferred from a mere acknowledgment of the debt: *Conklin v. Ogborn*, 7 Ind. 553. See further on the question of ratification *post*.

It has been held that an infant could not disaffirm his contract of partnership during his infancy: *Dunton v. Brown*, 31 Mich. 182; but this is not correct on principle, and has been decided to the contrary: *Adams v. Beull*, 67 Md. 53; 1 Am. St. Rep. 379. The infant may rescind a contract entered into by the firm, as to himself, and maintain a suit in enforcement of the disaffirmance: *Kerr v. Bell*, 44 Mo. 120; and infancy may be interposed by him as a bar to any claim of personal liability in an action upon a contract made by the partnership: *Folds v. Allardt*, 35 Minn. 488; *Mason v. Wright*, 13 Met. 306. "The goods having been furnished to a partnership of which defendant was known to be a member, the court ruled that he was liable, on the ground, substantially, that by engaging in business as a member of the firm, he held himself out as competent to bind himself by contract, and hence is estopped to set up his infancy as a sole defense. The rule is not, however, changed by the fact that he was a member of a partnership. His contracts are voidable as in other cases": *Folds v. Allardt*, 35 Minn. 488. So infancy is a good defense to an action against an infant, as a secret partner, to recover the price of goods purchased ostensibly by his co-defendant on the false representations of the infant as to the solvency of the co-defendant, in order that they might both profit by obtaining the goods, the action being founded on contract, and not seeking to avoid the sale and reclaim the goods, or to recover on the ground of fraud practiced by the infant: *Vinsen v. Lockard*, 7 Bush, 458. See the subject of disaffirmance fully discussed, *post*.

It was held in an early case that if a firm of partners accept a bill of exchange, and one of the partners is an infant, the contract being void as to the infant, the holder of the bill might declare on it as accepted by the adult partner only, and if the defendant pleads in abatement that the other partner ought also to be sued, the plaintiff might reply his infancy: *Burgess v. Merrill*, 4 Taunt. 468; and see *Gibbs v. Merrill*, 3 Taunt. 307, 313; but this ruling is certainly not now law, if indeed it ever was; and a short time afterwards it was correctly decided in this country that where one of the members of a partnership which executed a promissory note was an infant, the plaintiff could not treat the note as void as to the infant, and sue the adult partner only: *Wamsley v. Lindenberg*, 2 Rand. 478. See *post*, "Bills and Notes." Where, in a suit against two partners for a partnership debt, one of them pleads infancy, and judgment is taken against the adult partner, the judgment, it is held, was nevertheless for a partnership debt, and, as such, was a charge on the partnership property: *Gay v. Johnson*, 32 N. H. 167.

It has been stated above that an infant member of a partnership may plead his infancy in bar to any claim of personal liability made against him on contracts of the firm. This proposition cannot be doubted, the infant not having ratified the contract of partnership, nor the particular firm contract in question, which perhaps he might have ratified without ratifying other partnership engagements. And even according to the case of *Kerr v. Bell*, 44 Mo. 120, where a partnership of which one member was an infant purchased real estate, the infant had the right to rescind the contract as to himself, and to maintain a suit in enforcement of the disaffirmance, and to compel a restoration of the property received by the vendor, the vendor having been restored to the land sold. It is, however, a question of considerable difficulty to determine what are the rights of an infant partner, as against the firm creditors, with respect to the assets of the firm, and his rights, as against his copartners, with respect to capital contributed by him, services he may have rendered the firm, and money paid by him for an interest in the business. It has been held that where an infant partner renounces and disaffirms his contract of partnership, and files his petition in court asking the appointment of a receiver, he will be deemed to have thereby consented that the court shall deal with the assets and close out the business so as to settle the ultimate rights of the parties concerned, and in such case the court will treat the assets as partnership assets as in any other case, and apply them first to the payment of the firm debts, before paying the infant the amount invested by him: *Shirk v. Shultz*, 113 Ind. 571. There would seem to be no doubt of the correctness of this decision.

In *Yates v. Lyon*, 61 N. Y. 344, which was a case involving the validity of an assignment for the benefit of creditors, made by copartners, of whom one was an infant, Reynolds, C., said: "It cannot be doubted but that the law would devote the assets of this firm to the discharge of the partnership obligations whenever any court should be appealed to for that purpose, and I do not see that the supposed equity of an infant partner should in such a case prevail against that of the creditors of the firm. . . . We see no substantial difference whether, in such a case, the property of the firm is subjected to the payment of the proper debts of the firm by the process of the law, or by the voluntary act of the insolvent debtors. In either case the result is precisely the same, and the infant is bound if he simply says nothing. . . . It is not too much to say that if an infant goes into a mercantile adventure which proves unsuccessful, he ought, at least, to be held so far that the assets acquired by the firm should be applied to the payment of the debts of the concern. If he has been cajoled into any waste of his capital, it hardly seems equitable that the creditor of the firm should, either directly or indirectly, be called upon for reimbursement. The utmost exemption that he ought to claim in such a case is, that he should not be made personally liable for debts beyond what the assets of the firm are able to pay; and even then the infant should claim the exemption." Again, in *Bush v. Linthicum*, 59 Md. 344, it was held that a plea of infancy was no bar to a suit for the dissolution of a partnership, the granting of an injunction restraining the defendant from collecting or disposing of the assets or contracting debts on account of the firm, and the appointment of a receiver to take charge of the assets of the firm and apply the same to the payment of its debts, Irving, J., saying: "Having formed this partnership, he cannot so far repudiate it during minority as to escape such consequences of partnership as do not involve personal liability for claims against the firm or costs incident to the legal settlement of its affairs. Such partnership must be dissolvable as any other,

and the partnership assets must be assignable to partnership creditors." The broad views expressed by these two latter cases, that the assets of a partnership should be appropriated to the satisfaction of firm creditors over the claims of an infant partner, appear to us to be a departure from the general principles governing the liability of infants on their contracts. Why the interest of the infant in the partnership assets should be subjected by implication of law to the claims of creditors of the firm, when it is perfectly well settled that an infant may repudiate any security, as a mortgage, expressly given by him, is not clear. Of course, if an infant would rescind a contract he may be obliged to restore the consideration he may have received, provided he still retains it; but the rule as stated here makes no distinction between such creditors who have disposed of property to the firm, which it still retains, and those creditors who are not in that condition. If it be said that the infant must restore an equivalent, if he have not the original consideration, the rule should not have stopped with the firm assets, but should at least make the infant answerable to the extent of any property which may belong to him. The question cannot be regarded as settled.

In the celebrated case of *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, there is a *dictum* accredited to Lord Mansfield, to the effect, that "if an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This *dictum* was approved by Gibbs, C. J., in *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, where it was held that an infant who took a lease of a house, occupied the premises for a time, and paid the rent, could not recover back the rent so paid, on avoiding the lease after he came of age, and quitting the premises. It was sought to apply the rule of this mischievous case to the case of an infant who agreed to enter into a partnership with a tradesman, and paid a deposit towards the purchase of an interest in the business, which was to be forfeited to the tradesman if the infant failed to fulfill the agreement, sought to rescind the agreement, and recover back the money so paid by him. It was held that he might recover, the court distinguishing *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, on the ground that there the infant had received something of value for the money he had paid, and could not put the defendant in the same position as before, while in this case the infant had derived no benefit from the transaction, and, besides, was subjected to a penalty: *Corpe v. Overton*, 10 Bing. 252; 3 Moore & S. 738; and see *Everett v. Wilkins*, 29 L. T. 846. In *Ex parte Taylor*, 8 De Gex, M. & G. 254, decided more than twenty years after *Corpe v. Overton*, 10 Bing. 252, 3 Moore & S. 738, an infant paid, by means of borrowed money, a premium upon entering into a partnership, and before he became of age disaffirmed the contract of partnership. It was held, approving *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, that the infant could not have recovered back the premium had his partners remained solvent, and therefore could not prove it under their bankruptcy.

In this country, *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, has been the subject of much adverse criticism. See *post*, "Infant's Right to Recover back Money Paid by Him on Disaffirmance of Contract." Yet, so far as the question under consideration is concerned, it has been held in *Page v. Morse*, 128 Mass. 99, that if an infant becomes a partner with another person, puts a sum of money into the business, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or the labor performed, in the absence of an express promise to pay him therefor. The court cites *Moley v. Brine*, 120 Mass. 324, a case the same in principle. The members of a partnership contributed to the common

stock in unequal proportions, with an agreement that the profits should be equally divided between them. Upon the dissolution of the partnership, the assets were insufficient to pay back the contributions of the several members in full. It was held, on a bill in equity to close up the partnership, that the assets must be divided in the proportions of the contributions, and the deficiency borne by the partners equally, and the fact that one of the members of the firm was a minor made no difference; the court saying: "The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his copartners the obligation of making up the deficiency"; citing, among other cases, *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560; *Ex parte Taylor*, 8 De Gex, M. & G. 254; and *Breed v. Judd*, 1 Gray, 455. In this latter case, an infant, in consideration of an outfit to enable him to go to California, agreed to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement, and recover back the amount so sent, deducting the amount of the outfit and other money expended for him by the other party in pursuance of the agreement. The court said the contract, in substance and effect, was, that the defendants should furnish the outfit, and the plaintiff his labor and time, and that the parties should divide the fruits of the enterprise in a certain proportion. And although such a construction made the contract one of partnership, and an infant could not be bound by such a contract so long as it remained executory, yet, said Thomas, J., "we know of no ground upon which, after arriving at full age, he can change the entire character of a contract so made and executed, treat the money so advanced by the defendants as a simple loan, and claim for himself all the fruits of an enterprise in which their money and his labor were the common stock, and this when the contract as originally made is found to have been fair, reasonable, and even beneficial to the plaintiff." The court went on to discuss the contract under other aspects, which need not here be considered. Again, it was held in *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379, citing *Holmes v. Blogg*, 8 Taunt. 511, 2 Moore, 560, that where money is paid by a minor in consideration of being admitted as a partner in a business, and he does become and remain a partner for a time, he would not be allowed, on voluntarily withdrawing from the partnership, to recover back the money thus paid, unless he was induced by fraudulent representations to enter into the partnership. But, on the contrary, it was held, with more correctness, in *Sparman v. Keim*, 83 N. Y. 245, that an infant might avoid an agreement of partnership, and recover back the money which he was induced to invest in the business on restoring the benefits received from the partnership.

LENDING AND BORROWING OF MONEY. — There can be no question that an infant who makes a loan of money may disaffirm his contract of lending, and recover back the money. It is even held that if an infant makes a usurious loan, taking the borrower's note, he may avoid the contract of lending, and recover the money loaned under a contract for money had and received: *Millard v. Hewlett*, 19 Wend. 301; Nelson, C. J., saying: "I put the case entirely upon the ground that the illegal contract is out of the question, unless we say that infants shall be bound by illegal contracts, though they are not by those which are legal, and then the objection of usury fails, and the right to recover becomes very plain."

On the other hand, an infant's contract of borrowing can be no more than voidable. It may, therefore, be ratified by the infant on coming of age, like any other voidable promise: *Kennedy v. Doyle*, 10 Allen, 161. "The agreement stood on the same ground as any other contract by an infant for anything but necessities. It was voidable, and not void, and if affirmed by her after coming of age, was binding upon her." The contract may, of course, be disaffirmed. And, certainly, one who has paid off a mortgage on the land of infants, at the request of their guardian, cannot maintain an action against them for money had and received or money lent; for the payment was voluntary, and not upon any contract with the defendants, and their guardian had no authority to subject them to the payment of the claim: *Bicknell v. Bicknell*, 111 Mass. 265. It may also be here noticed that infancy is a good defense to an action for money, generally, paid over to the defendant for the plaintiff: *Root v. Stevenson's Adm'rs*, 24 Ind. 115. As to an infant's liability on notes and bills, see *post*, next head, "Bills and Notes."

A number of cases have arisen concerning an infant's liability for money loaned to or advanced for him to pay for necessities. It seems to be the rule that an infant is not liable at law for money borrowed by him for necessities, although actually expended by him for that purpose; but, on the other hand, he is liable for money directly applied by the lender in procuring necessities for him: *Rearsby and Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Earle v. Peale*, 10 Mod. 67; 1 Salk. 386; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197; 1 Ld. Raym. 344; *Probart v. Knouth*, 2 Esp. 472, note; *Clarke v. Leslie*, 5 Esp. 28; *Hedgeley v. Holt*, 4 Car. & P. 104, 105; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Swift v. Bennett*, 10 Cush. 436; *Rundall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sand. 306; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb, 519. The infant is, however, liable in equity for money borrowed and actually applied by him for the payment of necessities: *Marlow v. Pitfeild*, 1 P. Wms. 558; *Hickman v. Hall's Adm'rs*, 5 Litt. 333, 342; *Watson v. Cross*, 2 Duval, 147, 149; *Price v. Sanders*, 60 Ind. 310. Several cases have determined, under different conditions of fact, that the particular purposes for which money was lent to or expended for an infant did not fall under the head of necessities: See *Smith v. Gibson*, Peake Add. Cas. 52; *Hedgeley v. Holt*, 4 Car. & P. 104; *West v. Gregg's Adm'r*, 1 Grant Cas. 53; *Magee v. Welch*, 18 Cal. 155; *Dorrell v. Hastings*, 28 Ind. 478, 479; *McKanna v. Merry*, 61 Ill. 177; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *State v. Howzrd*, 88 N. C. 650, 651. See this question were fully considered *post*, under the head "Liability for Money Borrowed or Advanced for Necessaries."

BILLS AND NOTES. — Some early cases entertained the view that the bills of exchange and promissory notes of infants were absolutely void. Thus it was held by Sir James Mansfield that if a firm of partners accepted a bill of exchange, and one of the partners was an infant, the contract being void as to the infant, the holder of the bill might declare on it as accepted by the adult partner only, and if the defendant pleaded in abatement that the other partner ought also to be sued, the plaintiff might reply his infancy: *Burgess v. Merrill*, 4 Taunt. 468; and see *Gibbs v. Merrill*, 3 Taunt. 307, 313. The same judge had previously held at *sist prius* that infancy was a good defense to an action on a bill of exchange accepted by the defendant for necessities, remarking: "Did any one ever hear of an infant being liable as acceptor of a bill of exchange? The replication [of necessities to the plea of infancy] is nonsense, and ought to have been demurred to": *Williamson v. Watts*, 1 Camp. 552. It has also been said, in actions on promissory notes to which

the plea of infancy has been interposed, that a negotiable note given by an infant, even for necessities, is absolutely void, and not merely voidable: *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9; for the reason, in the language of *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33, "if the note be valid in the first instance, as a negotiable note, the consideration cannot be inquired into when it is in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration." But this is no reason; for, on the contrary, a party to the negotiable instrument may plead his infancy as a defense to an action brought thereon by even a *bona fide* holder for value without notice, and before maturity: See Tiedeman on Commercial Paper, sec. 280. It will be further noticed that the facts of these cases did not call for an expression of opinion that the paper was void.

Other cases, for a similar reason, have denied the right of the holder of a promissory note given for necessities to maintain an action thereon against the defense of infancy. In other words, infancy is a complete defense to an action on a promissory note given for necessities, but without any particular regard to the question whether the note is void or voidable: *Fenton v. White*, 4 N. J. L. 100; *McCrillis v. How*, 3 N. H. 348. In *Morton v. Steward*, 5 Ill. App. 533, it was held that the promissory note of an infant given for necessities was invalid unless ratified; and although, perhaps, the payee might maintain an action thereon, a transferee of the note could not recover upon it. It should be observed that while, according to these views, no action can be maintained on the negotiable instrument, yet the infant will be required to pay the reasonable value of the necessities: *McMinn v. Richmonds*, 6 Yerg. 9; *McCrillis v. How*, 3 N. H. 348.

According to what we understand to be the better authority, however, an infant may be held liable on his express contract for necessities, when the contract is of such a form that the consideration may be inquired into, and the amount agreed to be paid is simply the reasonable value of the necessities; and should the stipulated amount exceed the reasonable value, the recovery on the contract is simply reduced to a just compensation. Therefore an action may be maintained against an infant on a promissory note, whether in the hands of the original payee or not, given for necessities; but the infant may show that the agreed sum is in excess of the reasonable value of the necessities, and thus reduce the recovery to their reasonable value: *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26; *Askey v. Williams*, 74 Tex. 294; and see *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; compare *Howard v. Simpkins*, 70 Ga. 322. And this so ruled by an early case concerning a single bill: *Russel v. Lee*, 1 Lev. 86; compare *Beeler v. Young*, 1 Bibb, 519. If a surety signs the note, and afterwards pays it, he may recover the amount so paid from the infant: *Cona v. Coburn*, 7 N. H. 368; 26 Am. Dec. 746; *Haine's Adm'r v. Tarrant*, 2 Hill (S. C.) 400; but see *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759. Several cases have decided that under the facts presented in them the notes were not executed for necessities at all, and consequently the defense of infancy was good: *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574; see also *Bouchell v. Clary*, 3 Brev. 194; *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Howard v. Simpkins*, 70 Ga. 322. See these questions concerning necessities more fully discussed *post*, under the head "Necessaries."

If a note be executed by an infant pursuant to some statute, it will be binding. Thus if a statute authorizes an infant father of a bastard child

to settle with the mother, and secure to her compensation for keeping the child, it impliedly gives him the power to execute instruments necessary in making such settlement, and, therefore, to a promissory note executed under such circumstances, infancy will be no defense: *Gavin v. Burton*, 8 Ind. 69. See *post*, "Contracts Entered into Pursuant to Statutes."

With regard to general bills and notes to which an infant becomes a party, there is no doubt that his infancy is a good defense to an action against them thereon: *Williams v. Harrison*, Carth. 160; *Holt*, 359; *Hussey v. Jewett*, 9 Mass. 100. But his contract is voidable only, and not void. Therefore an infant's acceptance of a bill of exchange is merely voidable, and is subject to confirmation after his arrival at full age: *Hyer v. Hyatt*, 3 Cranch C. C. 276; and the acceptance of a bill drawn while the acceptor was an infant, but accepted by him after he came of age, is not even voidable: *Stevens v. Jackson*, 4 Camp. 164; and see *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124. The infant's note, whether negotiable or not, which he signs as a maker, is likewise simply voidable: *Young v. Bell*, 1 Cranch. C. C. 342; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544, 548; *Fant v. Cathcart*, 8 Ala. 725; *Strain v. Wright*, 7 Ga. 568; *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; *Best v. Givens*, 3 B. Mon. 72; *Reed v. Batchelder*, 1 Met. 559; *Minock v. Shortridge*, 21 Mich. 304; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Wright v. Steele*, 2 N. H. 51; *Aldrich v. Grimes*, 10 N. H. 194; *Edgerly v. Shaw*, 25 N. H. 514; 57 Am. Dec. 349; *Houston v. Cooper*, 3 N. J. L. 866; *Goodsell v. Myers*, 3 Wend. 479; *Everson v. Carpenter*, 17 Wend. 419; *Taft v. Sergeant*, 18 Barb. 320, 321; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 755; *Wamsley v. Lindenberger*, 2 Rand. 478. It is therefore subject to his ratification or disaffirmance. If he ratifies the paper on coming of age, he thereby makes it a good negotiable note from the time it was made, and consequently, if he makes a new promise to pay the note to the payee, who afterwards transfers the note, the transferee takes the paper as a valid negotiable instrument: *Reed v. Batchelder*, 1 Met. 559; see also *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; and on the other hand, if he disaffirms the note, no action can be maintained against him either by the payee or a subsequent transferee: *Hoyt v. Wilkinson*, 57 Vt. 404. The same objection has been urged against the validity of an infant's general negotiable note as against the validity of his negotiable note given for necessities; namely, that the defense of infancy would not avail against a *bona fide* holder for value without notice, and before maturity, and the note might necessarily operate to his prejudice. This, however, as has been said, is a mistaken notion; for infancy may be set up as a defense to an action on the note by such a holder. There is, then, no more reason why the negotiable note of an infant should be void than his non-negotiable note; and no more reason why his non-negotiable note should be void than any other contract which he may make. The same remarks apply to an infant's bill of exchange, or other negotiable instrument.

If the criterion of Lord Chief Justice Eyre, to the effect that if the court can pronounce the contract of an infant to be to his prejudice, it is void, while if it be uncertain whether the contract be to his benefit or prejudice, it is voidable, be adopted, still, an infant's general commercial paper, whether it be negotiable or not, would be simply voidable. But as shown *supra*, under the head "Void and Voidable," this is no longer a test. As early as 1827, Cranch, J., said in *Hyer v. Hyatt*, 3 Cranch C. C. 276, 277, in holding an infant's acceptance of a bill of exchange to be voidable only, and not void: "I am inclined to think that no contract entered into by an infant is abso-

lutely void, although all contracts by infants, except for necessities, are voidable. There are some *dicta* that contracts made by an infant to his prejudice are void, not voidable; but I doubt whether in law there be any difference as to validity between those which are beneficial and those which are prejudicial to the infant; both are voidable, but neither is absolutely void. There is no case in which it has been decided that a contract between an infant and an adult can be avoided by the adult upon the ground of the infancy of the other party. If the contract were absolutely void, neither party would be bound. The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract."

It should be remembered, however, that a statute may make an infant's general bills and notes, as well as his other contracts, void: See *supra*, "Statutory Regulation"; and see, under a former statute of Connecticut noticed under that head, *Alsop v. Todd*, 2 Root, 105, 109; *Lawrence v. Gardner*, 1 Root, 477; *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149, — cases which apply the statute to promissory notes. A statute conferring capacity upon married women to contract generally does not thereby remove the disability of infancy, and therefore a married woman may plead her infancy to an action on a promissory note: *Cummings v. Everett*, 82 Me. 280.

The doctrine that the executed contracts of infants are binding until avoided, but their executory contracts are invalid until affirmed, also here deserves a passing notice, for, according to it, it is said that the promissory note of an infant is not void, because it may be confirmed, but that it is invalid until it is confirmed: *Edgerly v. Shaw*, 25 N. H. 514, 516; 57 Am. Dec. 349, 350; *Minock v. Shortridge*, 21 Mich. 304, 315; *Morton v. Steward*, 5 Ill. App. 533, 535; and see also *State v. Plaisted*, 43 N. H. 413. This notion, which seems to be founded on a misconception of what is meant by "voidable," is, happily, not widespread. See it criticised *supra*, "Void and Voidable."

The promissory note of an infant has been held to be equally voidable when given in settlement of his torts or criminal acts, as when given in the adjustment of an account against him; although if the note be avoided by the plea of infancy, the plaintiff may be remitted to his original cause of action: *Shaw v. Coffin*, 58 Me. 254, 256; 4 Am. Rep. 290; see also *Hanks v. Deal*, 3 McCord, 257; *contra*, *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519. In an action on a note executed by the defendant, it is sufficient, according to the code practice, for the defendant to allege in his answer that at the time of the execution of the note he was an infant. It is not necessary to allege that the note was voidable: *Stern v. Freeman*, 4 Met. (Ky.) 309. The burden of proof is upon the plaintiff, in an action on a note to which the plea of infancy is interposed, to show that the note was either given for necessities (or, we may add, was given pursuant to some statute), or that the defendant ratified it after attaining full age: *Catlin v. Haddock*, 49 Conn. 492; 44 Am. Rep. 249, 254.

There have been numerous attempts by parties to bills of exchange and promissory notes to escape liability thereon because of the infancy of some other party, but these attempts have generally been failures. A guarantor or surety of the infant, whether he is or is not really a party to the paper, cannot set up the infancy of the principal party as a defense to his collateral obligation. Thus in an action on a promise to pay the promissory note of

another, the fact that the note was voidable in consequence of the infancy of the maker furnishes no defense to the action: *Hesser v. Steiner*, 5 Watts & S. 476; the note being voidable, and not void, was, with an agreement to forbear to sue it, a sufficient consideration for the promise to pay it by the third person, and, furthermore, infancy can only be taken advantage of by the infant himself, or some one who represents him. But while, as a general proposition, infancy will not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertakings, yet sureties on the promissory note of an infant, given for the price of land purchased by him, are not liable where the infant disaffirms the contract after attaining majority, and restores the land to the grantor, the consideration of the note being entirely extinguished: *Baker v. Kennett*, 54 Mo. 82. Though the maker of a promissory note be an infant, an indorser, very plainly, aside from the proposition that the objection of infancy is personal, will be bound by his indorsement, for he warrants the capacity of the maker: *Henderson v. Fox*, 5 Ind. 489; and for like reasons, it is no defense to an action by the indorsee of a bill of exchange against the acceptor that the drawers, who had drawn the bill payable to themselves, and indorsed it, were infants when the bill was drawn: See *Taylor v. Croker*, 4 Esp. 187. Furthermore, since the indorsement of a bill of exchange or promissory note by an infant transfers the title, and is simply voidable, and since the privilege of infancy is personal, the infancy of the payee of a bill or note is no defense to an action on the paper by an indorsee against the acceptor, drawer, or maker: *Grey v. Cooper*, 3 Doug. 65; *Jones v. Darch*, 4 Price, 300; *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *Dulley v. Brownfield*, 1 Pa. St. 497; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 382; and the same rule applies where the paper is transferred without indorsement: See *Garner v. Cook*, 30 Ind. 331; and where a non-negotiable note is indorsed by an infant payee: *Hastings v. Dollarhide*, 24 Cal. 195. A further reason is suggested why the maker of a note or drawer of a bill cannot set up the defense of the infancy of the payee to an action by the transferee of the paper; namely, that the maker or drawer by making a negotiable instrument payable to a certain person asserts to the world the competency of the payee to negotiate the paper: See *Frazier v. Massey*, 14 Ind. 382.

There is no doubt that if an infant indorser were sued on his contract of indorsement, infancy would be, as to him, a complete defense: *Nightingale v. Withington*, 15 Mass. 272, 274; 8 Am. Dec. 101, 102; *Dulley v. Brownfield*, 1 Pa. St. 497. As before remarked, the indorsement transfers the title, which, however, the infant may ratify or avoid. Undoubtedly, the infant may disaffirm the indorsement, and intercept payment to the holder of the paper, at any time before the maker or other party who is called upon for payment has paid it to the holder; and, of course, in that case, the party called upon to pay could set up the disaffirmance as a defense to an action against him by the holder: See *Hastings v. Dollarhide*, 24 Cal. 195. Whether he could disaffirm his transfer after payment made to the holder is another question. In *Welch v. Welch*, 103 Mass. 562, it was said by Colt, J., citing *Nightingale v. Withington*, 15 Mass. 272, 274, 8 Am. Dec. 101, 102, that the indorsement by an infant payee of a note could not be set aside by him as void, so as to give him a right to recover of the maker, who had paid the indorsee before notice that the order of payment had been countermanded, for the reason that the transaction had become executed in favor of the appointee, and could not be opened without restating the maker. We regard this dictum as entirely unsound, and see no reason on principle why the infant may not

repudiate his indorsement after as well as before payment made to the holder of the paper, and himself claim payment, leaving the equities between the parties to be otherwise adjusted. This was the view taken in *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503, 506, where there is an expression of opinion to the effect that the infant payee of a non-negotiable note may disaffirm his contract of assignment, and recover of the maker, notwithstanding the maker paid the paper to the assignee before the infant's disaffirmance of the assignment.

It may here be noticed that an infant is not liable at law or in equity on his promissory note from the fact that he traded as an adult, and his infancy was unknown to the party who took the note. He is not thereby estopped from pleading his infancy as a defense: *Van Winkle v. Ketcham*, 3 Caines, 323; *Houston v. Cooper*, 3 N. J. L. 866; *Baker v. Stone*, 136 Mass. 405. Nor would he even be liable thereon at law because he fraudulently represented himself to be of full age at the time he executed, and the payee relied upon such representations: *Bateman v. Kingston*, 6 L. R. Ir. 328; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146. See this question fully considered *infra*, "Infant's Concealment or Misrepresentation as to Age."

Finally, it may be observed that the execution or indorsement of a note, negotiable or non-negotiable, by means of an agent appointed by an infant, is not void, but voidable: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229; *Hardy v. Waters*, 38 Me. 450; *Hastings v. Dollarhide*, 24 Cal. 195. *Contra*, *Semple v. Morrison*, 7 T. B. Mon. 298; and see *post*, "Delegation of Authority."

BONDS. — An infant's bond, by which we are to understand his obligation under seal, with a penalty, has sometimes been considered as void, as being a contract clearly to his prejudice. In *Fisher v. Mowbray*, 8 East, 330, Lord Ellenborough said that an infant could not bind himself in a bond with a penalty, conditioned for the payment of interest as well as principal; but the only question really involved was the right of the infant to avoid the bond by a plea of infancy. A few years later, in *Baylis v. Dinely*, 3 Maule & S. 477, in debt on a bond with a penalty, conditioned for the payment of the principal sum with interest, a replication that after the making of the bond, and before the commencement of the action, the defendant attained full age, and ratified and confirmed the bond, was held by the same judge to be ill on demurrer; for, it was again said, an infant could not give a bond with a penalty, and for the payment of interest, and unless the infant was estopped by some act at full age of as high authority as the bond, the defense of infancy would be good. The case involves altogether a singular confusion of ideas; and perhaps is really only authority on the proposition that the bond of an infant cannot be confirmed by parol. This question will be noticed hereafter under the head of ratification. The case of *Hunter v. Agnew*, 1 Fox & S. 15, holds a bond with a penalty, given by an infant, to be void, and not merely voidable; and see also some remarks in *Waples v. Hastings*, 3 Harr. (Del.) 403.

An infant's bond with a penalty, given for money paid out for necessities, was also said to be void, in *Ayliff v. Archdale*, Cro. Eliz. 920; that is, no action could be maintained thereon against the defense of infancy; but it was remarked that if the plaintiff had taken an obligation for the very sum which he had laid out for the defendant, it would have been otherwise. According, also, to the case of *Bliss v. Perryman*, 1 Scam. 484, an infant cannot bind himself by bond, not even, it seems, for necessities; and it is held, when the plaintiff relies upon a new promise made after full age, he must declare upon the simple contract which the new promise was meant to

establish; and, therefore, in an action on a bond, to which infancy was pleaded, the plaintiff could give evidence of a new promise by the defendant after coming of age; and see *Hussey v. Jewett*, 9 Mass. 100, 101. But "where the instrument given for necessities is such as to admit of inquiring into its consideration, the infant is liable upon the instrument, and if the evidence be such as not to warrant a recovery for the amount, judgment may be rendered *pro tanto* for that part due on the instrument for which a minor would be legally liable": *Guthrie v. Morris*, 22 Ark. 411. Therefore if, by statute, the consideration of a bond may be inquired into, an action may be maintained on a bond given by an infant for necessities: *Guthrie v. Morris*, 22 Ark. 411. "Being liable for the value of the necessities upon a *quantum valebant*, what protection could there be in permitting him to defeat an action on the instrument for the same amount? Protection is the sole end of the infant's privilege, and the latter should never be extended further than is demanded by the former": *Guthrie v. Morris*, 22 Ark. 411. This opinion, in our judgment, is sound sense and sound law.

In *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105, the court, approving the rule of Perkins, to the effect that all deeds of an infant which take effect by delivery of his hand were voidable only, held the bond of an infant to be simply voidable. And, as has been seen, a number of cases have established that an infant's bond for title is voidable merely, and not void: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Weaver v. Jones*, 24 Ala. 420; *Bozeman v. Browning*, 31 Ark. 364; see *ante*, "Executory Contracts to Sell Real Property." These cases are strictly in accord with the modern rule that all general contracts of infants are voidable, and not void. It has also been held that an administration bond given by an infant is not void, but voidable, and may be affirmed, or not, after he attains full age: *Chambers v. Wherry*, 1 Bail. L. 28.

If the bond of an infant be executed by him pursuant to the requirements of a statute, it is then not even voidable, but so far as infancy is concerned, absolutely binding. Thus the bond or recognizance entered into by a minor for his personal appearance at court, to answer a charge against him, is valid and binding, under statutes which provide for the taking of such bonds or recognizances from defendants who may be infants: *McCall v. Parker*, 13 Met. 372; *State v. Weatherwax*, 12 Kan. 463; and infancy is no defense to an action on a bond, executed pursuant to statute, by the reputed father of a bastard child, conditioned to indemnify the town against liability for the support of the bastard: *People v. Moores*, 4 Denio, 518; 47 Am. Dec. 272; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. Bronson, C. J., saying in the first of these cases: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation." The greatest question of difficulty in this connection has been, Is the infant included within the provisions of the statute? See *post*, "Contracts Entered into Pursuant to Statutes."

It may here be noticed that although an infant, at the time of making a bond, fraudulently represented that he was of full age, yet the bond is nevertheless only voidable, at his election, at law, though it might be otherwise in equity: *Conroe v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; and see *post*, "Infant's Concealment or Misrepresentation as to Age."

SEALED CONTRACTS, GENERALLY. — The general contracts of an infant are none the less voidable because they are under seal, even according to the old theory that contracts prejudicial to an infant are void: *Whitney v. Dutch*, 14 Mass. 457, 461; 7 Am. Dec. 229, 232, per Parker, C. J.; *West v. Penny*, 16

Ala. 187; *Stokes v. Brown*, 4 Chand. 39; 3 Pinn. 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760; *Vaughan v. Parr*, 20 Ark. 600. "From a careful review of the authorities," says Whitney, J., in *Little v. Duncan*, 9 Rich. L. 55, 64 Am. Dec. 760, "I do not perceive that the question in any way turns on the fact of whether the contract was under seal or not." Such a contract is, therefore, capable of ratification or disaffirmance by the infant; and it may be confirmed by the infant, after reaching full age, by parol: *Vaughan v. Parr*, 20 Ark. 600; and see *Stokes v. Brown*, 4 Chand. 39; 3 Pinn. 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760.

INTEREST. — In *Fisher v. Mowbray*, 8 East, 330, and *Baylis v. Dinely*, 3 Maule & S. 477, Lord Ellenborough expressed himself to the effect that an infant could not give a security for interest; at least, his bond, with a penalty, conditioned for the payment of a principal sum, with interest, was void, as being clearly prejudicial. In *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228, it was also held, citing *Fisher v. Mowbray*, 8 East, 330, that interest would not be allowed on an account against an infant for necessities; but this ruling was disapproved in *Bradley v. Pratt*, 23 Vt. 378, in which it was held that interest might be recovered on a promissory note given by an infant for the reasonable value of necessities, Redfield, J., saying: "It seems to us, upon principle, if the infant is not to be held liable for interest, the price should be proportionately increased, which is the same thing. It is incomprehensible how if one, for board, deserves to have \$2.50 per week in hand, if the payment be delayed for years, the same sum is to meet the obligation. One might as well hold that a merchant should furnish goods to infants at cost, without freight even. The rule has no force when carried to that absurd length." It is impossible to escape this reasoning with respect to necessities; and in regard to other contracts of infants, certainly no court at the present day, even conceding that contracts which are to the infant's detriment, are void, would feel justified in declaring them to be void because they included stipulations for interest.

ACCOUNTS STATED. — It was at one time commonly said that an infant could not state an account so as to bind himself: *Hedgeley v. Holt*, 4 Car. & P. 104; *Oliver v. Woodroffe*, 4 Mees. & W. 650; *Burghart v. Hall*, 4 Mees. & W. 727, 732; *Vent v. Osgood*, 19 Pick. 572, 575, per Putnam, J. "An infant cannot be liable on an account stated," says Lord Abinger in *Burghart v. Hall*, 4 Mees. & W. 727, 732, "and the reason given is, that he cannot calculate, and is therefore incapable of stating an account." This may mean nothing more than that infancy may be a good defense to an action on an account stated; but, nevertheless, these cases seem to have been regarded as holding the account stated of an infant to be absolutely void. It has also been very generally held that an infant is not liable on an account stated for necessities: *Wood v. Witherick*, Latch, 169; *Pickering v. Gunning*, Palmer, 528; W. Jones, 182; *Ingledeu v. Douglas*, 2 Stark. 36; *Trueman v. Hurst*, 1 Term Rep. 40; *Bartlett v. Emery*, 1 Term Rep. 42, note; *Oliver v. Woodroffe*, 4 Mees. & W. 650. It is difficult to understand upon what theory these latter cases proceed, except it be that the account stated is void; or, more probably, and it seems to us correctly, as suggested by Baron Parke in *Williams v. Moor*, 11 Mees. & W. 256, 265, and Chief Justice Shaw in *Stone v. Dennison*, 13 Pick. 1, 6, 23 Am. Dec. 654, 657, that the items cannot be gone into; for if the items could be inquired into, and the balance, as struck and agreed to, represented simply the reasonable value of the necessities, a recovery, according to the weight of authority, might be had upon it: See post, "Express Contracts for Necessaries." However this may be, the English case last cited settled the question that

an account stated by an infant was not absolutely void, but voidable only, and therefore might be ratified by the infant after attaining full age. Baron Parke said: "We can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or any other contract. The contract of an infant for goods sold and delivered (not being necessities) is as completely void as his contract on an account stated, if by the word 'void' is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract, as well as on the other. But if by the word 'void' is meant incapable of being ratified, then we can discover neither principle nor authority for the distinction relied on. . . . It was indeed argued for the defendant that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get anything valuable; that he has no *quid pro quo*. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of the transactions between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers."

SURETYSHIP. — *Dicta* are to be found in a number of cases to the effect that an infant's contract of suretyship is necessarily prejudicial to him, and is therefore absolutely void: *Wheaton v. East*, 5 Yerg. 41, 61; 26 Am. Dec. 251, 252; *West v. Penny*, 16 Ala. 187, 189; *Hastings v. Dollarhide*, 24 Cal. 195, 209; *Robinson v. Weeks*, 56 Me. 102, 106. In fact, the contract of suretyship of an infant is the usual example of a contract that is void because manifestly to his prejudice. In *Groniss v. Clark*, 4 Md. Ch. 403, it was also said that a mortgage of her reversionary interest in real and personal property, executed by an infant *feme covert* to secure a debt due by a firm of which her husband was a member, was absolutely void, as necessarily prejudicial, and incapable of confirmation; but the facts of the case simply involved the right of the infant to avoid the mortgage for her infancy; and in *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686, it was likewise said that a mortgage given by an infant *feme covert* to secure the debt of her husband was absolutely void, and not merely voidable, since it could not be beneficial to her; but here, also, the case simply involved the right of the infant to disregard the mortgage, and the proceedings had under it. And according to the early statute of Connecticut, quoted *ante*, under the head "Statutory Regulation," it was decided that a promissory note executed by an infant while under the government of a guardian, as surety of another, was a contract against his interest, and absolutely void, and incapable of confirmation: *Maples v. Wightman*, 4 Conn. 376; 10 Am. Dec. 149. In *Curtin v. Patton*, 11 Serg. & R. 305, 310, 311, the court calls an infant's contract of suretyship "absolutely void," but yet it recognizes the possibility of a confirmation by the infant when of full age; and of course there could be no confirmation if the contract were absolutely void.

These views do not accord with principle or the weight of authority. It must now be regarded as settled that the contract of suretyship of an infant, like his other general contracts, is voidable only, and not void, and is consequently capable of ratification by him when he arrives at full age: *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496; *Williams v. Harrison*, 11 S. C. 412; *Reed v. Lane*, 61 Vt. 481; and see *Hinely v. Margaritz*, 3 Pa. St. 428. In *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496, McIlvaine, J., says: "The privilege of infancy is accorded for the protection of the infant from injury resulting from im-

sition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult laboring under no disability may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance we think is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his sense of right and duty, he should, in law, as in morals, be bound to their performance." And in *Williams v. Harrison*, 11 S. C. 412, Willard, C. J., remarks: "Assuming that a person, being of full age, and, as such, chargeable with knowledge of his legal rights, deliberately determines that his interest or duty demands that he should recognize and discharge an obligation, imperfect through the fact of its assumption during minority, it would be difficult to find any sound reason why the courts should interfere to deny effect to such an act." Even in a state where the benefit and detriment theory seems to some extent to be still adhered to it is said: "It cannot be held as a matter of law that to sign a promissory note as surety is necessarily not beneficial to an infant": Gray, C. J., in *Owen v. Long*, 112 Mass. 403. Finally, in *Patchin v. Cromack*, 13 Vt. 330, it was held that the recognition of an infant was not void, but voidable only; the court saying: "A recognizance, or debt of record, acknowledged by an infant in court, or before a magistrate, is, in no case, to be adjudged void, but voidable only."

INSURANCE. — An infant's contract of insurance by which he is insured against fire is not void, but voidable only, at the election of the infant; and the defense of infancy is personal, and is not open to the company, in an action against it to recover for the loss: *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238. Such a contract cannot be a contract for necessities, which will bind the infant absolutely: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

SHARE-HOLDER IN CORPORATIONS. — There is no doubt that if an infant purchase of a corporation shares of its capital stock, he may avoid the contract of purchase, and recover back the money paid: *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429.

Concerning the liability of an infant share-holder for calls, there have been a number of adjudications in England. In the first of these cases, that of *Cork etc. Ry v. Casenove*, 10 Q. B. 935, to a declaration in debt for calls, charging the de'endant as the holder of shares under a railway act incorporated with the Companies' Clauses Consolidation Act, 8 and 9 Victoria, chapter 16, it was held to be no answer that defendant, when he became the registered holder of the shares, and when he became indebted for the calls, was an infant, and that he had not, since he attained his age, been registered anew, or ratified the original registration; for (per Denman, C. J., and Patteson, J.) an infant was liable for calls by the express wording of the statute of Victoria; at all events (per Coleridge and Erle, JJ.), he was liable if he was sued after attaining his age, and still held the shares; for such holding would be a ratification. In the next case, *Newry etc. Ry v. Coombe*, 3 Ex. 565, the defendant pleaded to a similar action that he became the holder of the shares by having contracted and subscribed for them, and that at the time of his so contracting and subscribing, and also at the time of making the calls, he was an infant, and while an infant he repudiated the contract and subscription. It was held that the plea was a good *prima facie* bar, and that if the defendant, after he became of age, disaffirmed his repudiation, or if he became

liable by enjoyment of the profits, those facts should be replied. Baron Parke, in discussing the liability of an infant subscriber under the Companies' Clauses Consolidation Act, said, in opposition to the view held by Chief Justice Denman and Justice Patteson in *Cork etc. R'y v. Casenove*, 10 Q. B. 935: "The law is never to be construed so as to affect with liability to a contract persons incapable of contracting; therefore, the liability imposed by this statute cannot apply to such of the subscribers as are lunatics, infants, or *feme covert*s. It is true that the statute contemplates the case of infants being share-holders, and no doubt they may acquire shares by descent or marriage; but the question here is, whether when an infant has become a share-holder by contract, he may not disaffirm it. I am of the opinion that this is the ordinary case of a contract with the company which the defendant may disaffirm." And see also *Northwestern R'y v. McMichael*, 5 Ex. 114, 124.

In the case next in order, *Leeds etc. R'y v. Fearnley*, 4 Ex. 26, the defendant pleaded that at the time of making the calls, and also at the time he became the holder of the shares, he was an infant. The pleas were held bad, it not appearing that the defendant had become a share-holder by original contract with the company, or that he had repudiated the shares. Baron Parke, in the course of the argument, remarked: "This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a property in the possible profits of the concern. Now, according to *Ketley's Case*, Cro. Jac. 320, and what is more distinctly laid down by Dodderidge, J., in *Kirton v. Elliott*, 2 Bulst. 69, he would be liable, unless he repudiated; then ought not the plea to aver that fact?" and Baron Rolfe said: "There is no averment that the defendant was originally a contractor for the shares with the company, nor that he avoided the contract, as there was in that case [*Newry etc. R'y v. Coombe*, 3 Ex. 565]. The defendant may have received these shares by will, or devolution upon him by the operation of law, or purchase from the original contractor, and he cannot be assumed to have repudiated them. The case of *Cork etc. R'y v. Casenove*, 10 Q. B. 935, decides that, under these circumstances, an infant is bound." In the case following of *Northwestern R'y v. McMichael*, 5 Ex. 114, the defendant pleaded that he became the original holder of the shares by contract with the company, and that at the time he became such holder, and also at the time the calls were made, he was an infant, and that he never ratified the contract, nor had he ever derived any profit, benefit, or advantage from the proprietorship of the shares. It was held that the plea was bad for want of an averment that the defendant had repudiated the contract, or, at least, that he continued a minor.

Baron Parke, in this latter case, thus explains the effect of an infant's becoming a share-holder: "If the effect of a person actually becoming a share-holder in a railway company by original agreement with the company ought to be treated as a mere contract with those to whom the proposal was made for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all; and the simple fact that the defendant at the time he made the contract was an infant would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants having become share-holders in railway companies have been held liable to pay calls made whilst they were infants. They have been treated,

therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which an infant has been admitted, unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: *Bac. Abr.*, tit. Infancy and Age, L. 5; *Co. Lit.* 380. After commenting upon the previous cases, and again disapproving the view taken in *Cork etc. Ry v. Cazenove*, 10 Q. B. 935, that an infant was liable to pay calls under the Companies' Clauses Consolidation Act, Baron Parke continues: "Under the statute, therefore, our opinion is, that the infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest; he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the calls was due. . . . When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient." Finally, it was held in *Dublin etc. Ry v. Black*, 8 Ex. 181, that a plea of infancy to an action for railway calls which alleged that the defendant disaffirmed and repudiated his contract and subscription after he became of full age was bad for not alleging that he repudiated within a reasonable time after he became of age.

It seems to us that the courts in the foregoing cases might have delivered themselves of the results attained with much less labor, and certainly with greater clearness of thought. While we concur in the main with the views finally expressed in them, yet we do not agree with all that they say. We suggest the following rule, based partly upon them and partly on the general principles of disaffirmance and ratification discussed *post*. That if an infant enters into an original contract of subscription for or purchase of shares in a corporation with the company itself, the contract, in the absence of a statute to the contrary, is not absolutely binding upon him, but may be ratified or disaffirmed by him. If the contract is ratified, he is, of course, liable for future calls; and since the ratification makes the contract good *ab initio*, he will be liable for past calls as well, though made during his infancy. If the contract is disaffirmed, the shares revert to the corporation, and the infant, of course, is no longer a share-holder, nor liable for future calls; and since the disaffirmance avoids the contract from the beginning, he will not be liable for past calls. He may disaffirm the contract during infancy, and whether calls have been already made at the time or not; and he must disaffirm, either before he reaches full age or within a reasonable time thereafter, or he will be taken to have ratified the contract by retaining the shares. He can conclusively ratify the contract only after full age. If the infant has acquired the

shares by purchase, gift, or bequest from some original or intermediate holder, it seems to us that, on principle, the results are in general the same. He may either affirm his holding or repudiate the shares. If he does the former, he is, of course, liable for calls; if the latter, he is not liable, and the shares revert to the original holder, or his representatives, who are liable. He may repudiate the shares during his minority; but if he retains them, as an owner, after coming of age, he ratifies the holding, and must answer the calls. We are not quite sure that if a disaffirmance may be made by the infant at the time suit is brought against him for the calls, it is necessary, in either case of acquisition, to allege a repudiation of the shares, but that the repudiation may be sufficiently shown by a plea of infancy merely.

A number of cases have been decided under the English Companies' Acts involving the liability of an infant share-holder to be placed on the list of contributories on the winding-up of the company. Thus it has been determined that an infant share-holder who becomes adult before the winding-up order is made may become liable as a contributor, because of his failure to repudiate the shares within a reasonable time after his arrival at full age, or because of his failure to repudiate, coupled with some affirmative acts on his part: *Mitchell's Case*, L. R. 9 Eq. 363; *Lumeden's Case*, L. R. 4 Ch. 31; *Ebbett's Case*, L. R. 5 Ch. 302; and the same may be the result where he becomes adult after the commencement of the winding-up of the company: *Hart's Case*, L. R. 6 Eq. 512; but compare *Wilson's Case*, L. R. 8 Eq. 240; *Castello's Case*, L. R. 8 Eq. 504; *Symon's Case*, L. R. 5 Ch. 298.

RELEASES AND COMPROMISES. — An infant's release of a claim on account of personal injuries sustained by him by reason of the tort of the releasee is not binding, nor is it void, but it is voidable by him, at his election, and constitutes no bar to an action to recover damages for the injuries: *Baker v. Lovett*, 6 Mass. 78; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; and the bringing of suit upon the claim is an unequivocal act of disaffirmance: *St. Louis etc. R'y v. Higgins*, 44 Ark. 293. But in the first of these cases, in which the release was given by the infant to one of two persons who had committed an assault and battery upon him, and the action was afterwards brought by the infant against the other wrong-doer, Parsons, C. J. said: "If the jury, on the trial, are convinced that the satisfaction received from Dennis [the releasee] was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation be found inadequate, the jury will give such further sum as, with the money received from Dennis, will amount to a reasonable satisfaction." The release by an infant of a claim arising from contract stands on the same footing as his release of a claim on account of a tort: See *Commonwealth ex rel. Strayer v. Hantz*, 2 Penn. & W. 333; but where, by statute, females of the age of eighteen are competent to enter into marriage contracts, a female of the age of eighteen may make a valid and binding release of a promise to marry: *Drexlin v. Riggsbee*, 4 Ind. 464. If, also, a party litigant who executes a release to a witness to extinguish the interest of the witness in the suit be an infant, he will not be bound by the release: *Walker v. Ferrin*, 4 Vt. 523; but in *Langford v. Frey*, 8 Humph. 443, it was said, rigidly applying the rule of *Keane v. Boycott*, 2 H. Black. 511, 515, discussed *supra*, that a release by an infant of his legacy or distributive share, in order to enable him to become a witness, was void, since the release could hardly be otherwise than injurious to him; and see *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463. A release may, of course, be binding by statute. See, however, *Bowers's Adm'x v. State*, 7 Har. & J. 32; *Fridge v. State*, 3 Gill & J. 103; 20 Am. Dec. 463.

An infant's compromise of a claim is likewise not binding upon him, but is subject to his avoidance: *Ware v. Cartledge*, 24 Ala. 622; 60 Am. Dec. 489; but it is no defense to an action on an agreement of compromise of a suit that the plaintiff was an infant, and the agreement was made on his behalf by his attorneys: *Chicago etc. R. R. Co. v. Lammert*, 19 Ill. App. 135, 140.

ARBITRATION. — It was said in an old case that an infant's submission to arbitration was void: *Rudston and Yates's Case*, March, 111, 114. Of course the submission is not binding as against the objection of infancy: See *Jones v. Payne*, 41 Ga. 23. But there is no reason why the submission should be anything more than voidable, and why it may not be ratified by the infant after attaining full age. This view was taken in *Jones v. Phenix Bank*, 8 N. Y. 228, in which it was held that if an infant submits a claim to arbitration, and on coming of age receives the proceeds of the award from his guardian, he thereby ratifies the submission and the award, and cannot recover on his original claim; and in *Barnaby v. Barnaby*, 1 Pick. 221, in which it was decided that an infant, after coming of age, ratifies an award made upon a submission by his guardian that the ward and infant heir shall pay an annuity to the widow in lieu of dower, where he pays part of the money then due, promises to pay the rest of that installment, and says that he had lodged property in his brother's hands to meet an annual payment.

SERVICE. — It has not been so much the question whether an infant's contracts of service, both when he is the employer and when the employed, are voidable, rather than void, but whether they are not binding, at least to some extent, upon him. There should be no doubt, however, that an infant employer is not liable for wages which he has agreed to pay: *Hughes v. Gallant*, 10 Phila. 518; but see *Delaware v. Clare*, Latch, 156. But, plainly, infancy is no answer to a claim for wages accruing due after majority has been attained, although on a contract of hiring originally made under age: *Thomas v. Waldo*, 1 Fost. & F. 173. And, of course, the infant, on coming of age, may ratify the contract of hiring.

There is more difficulty where an infant enters into a contract by which he agrees to serve another. In *Rex v. Inhabitants of Chillesford*, 4 Barn. & C. 94, 101, Bayley, J., said: "An infant may make a contract for his own benefit; he may, therefore, make a contract for hiring and service, for that will be beneficial to him. It will give him a right to sue for wages. If he does not perform his contract, although no action will lie against him, he will be liable to the statutory regulations applicable to masters and servants." And in a proceeding under 4 George IV., chapter 34, against a servant for absenting himself from the service, it was said in *Wood v. Fenwick*, 10 Mees. & W. 195, that a contract of hiring and service for wages was a contract beneficial to an infant, and therefore binding upon him [so far as the statute was concerned], though the contract contained clauses for referring disputes to arbitration, and for the imposition of forfeitures in case of neglect of duty, to be deducted from the wages. But in *Regina v. Lord*, 12 Q. B. 757, which was an information against an infant servant, under the same statute, Lord Denman held that an agreement to serve for wages might be for an infant's benefit; but an agreement which compelled an infant to serve at all times during a certain term, but left the master free to stop his work and wages whenever he chose to do so, could not be considered as beneficial to the servant, and was wholly void [for the purposes of the prosecution]. On the other hand, under the Employees and Workmen Act, 1875, 38 and 39 Victoria, chapter 90, which enables a dispute between employer and workmen to be

heard and determined by a court of summary jurisdiction, an agreement by which an infant undertakes to serve iron ship-builders and boiler-makers as plater and riveter for a term of five years, at weekly wages, with a proviso that should the employers cease to carry on their business, or find it necessary to reduce the operations of their works, either temporarily or permanently, from their being unable to obtain materials, or in consequence of any accident, or in consequence of strikes or combinations of workmen, or from any cause over which they should not have any control, they should have power to terminate the agreement, and discharge the infant upon giving him fourteen days' notice, was held not to be void on the face of it, so as to prevent it from being enforced against him according to the act: *Leslie v. Fitzpatrick*, L. R. 3 Q. B. Div. 229, the court saying: "The agreement in question is not open to the objections which were held fatal in *Regina v. Lord*, 12 Q. B. 757. According to the construction put upon the contract in that case, it bound the infant not to engage in any other service or business during the whole term, while it reserved to the master the right to stop the work and the wages whenever he pleased. Moreover, it rendered the infant liable to be dismissed for any misconduct or disobedience, and upon dismissal, to forfeit all his wages which should then be due and unpaid. That contract was manifestly void on the face of it. Either stipulation was of itself sufficient to invalidate it. The first was inequitable; the second violated a settled rule of law, by which an infant is incapable of contracting himself out of his acquired rights, or subjecting himself to a penalty." See also *Birtin v. Forth*, 33 L. T. 532.

In this country, an infant's contract of work and labor, or service, for wages, is not binding upon him, but is subject to his avoidance, at least before the contract has been fully executed by the parties, by the performance of the service and the payment of the wages: See the cases referred to in the following paragraphs of this head. "Even a contract of apprenticeship," says Parker, C. J., in *Moses v. Stevens*, 2 Pick. 332, 335, "by means of which he is to acquire a knowledge of some mechanical or other business, is not by the common law obligatory; certainly a contract by which he disposes of his personal labor without any stipulation for instruction is less deserving of legal protection." Infancy, therefore, is a good defense to an action against him for a breach of the contract: *Francis v. Felmit*, 4 Dev. & B. 498. And when an infant has disaffirmed the contract, a person who afterwards employs him is not guilty of the violation of a statute which makes it a penal offense to entice away or employ a laborer or servant who has contracted in writing to serve another for a specified time, "such contract being in force, and binding on the parties thereto": *Langham v. State*, 55 Ala. 114; overruling *Murrell v. State*, 44 Ala. 367. The contract, of course, is binding until avoided by the infant: *Nashville etc. R. R. v. Elliott*, 1 Cold. 611; 78 Am. Dec. 506. In *Nickerson v. Easton*, 12 Pick. 110, a contract in writing, signed by a minor, his mother and step-father, of the one part, and by the defendant of the other part, which recited that the minor had been living with the defendant as an apprentice, but that no indenture had been executed, and which stipulated that the minor should go on a whaling voyage, and that the defendant should furnish him outfits, and should receive all his earnings on the voyage, and that should the ship return before the minor reached the age of twenty-one, he should be free from his apprenticeship, was held to be a contract for an independent service and purpose, and was not binding upon the minor, and therefore he was entitled to recover his earnings on the voyage, which had been received by the defendant.

It follows that if an infant makes a special contract to labor for a certain time at certain wages, he may, nevertheless, avoid the contract at his pleasure, and recover on a *quantum meruit* for the services performed, as though no special contract had been made: *Moses v. Stevens*, 2 Pick. 332; *Vent v. Osgood*, 19 Pick. 572; *Gaffney v. Hayden*, 110 Mass. 187; 14 Am. Rep. 580; *Thomas v. Dike*, 11 Vt. 273; 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206; *Medbury v. Watrous*, 7 Hill, 110; *Whitmarsh v. Hall*, 3 Denio, 375; *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229; *Vehue v. Pinkham*, 60 Me. 142; *Lowe v. Sinklear*, 27 Mo. 308; *Ray v. Haines*, 52 Ill. 485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Van Pelt v. Corwine*, 6 Ind. 363; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133. The cases of *McCoy v. Huffman*, 8 Cow. 84, and *Weeks v. Leighton*, 5 N. H. 343, to the contrary, have been overruled by *Medbury v. Watrous*, 7 Hill, 110, and *Luskin v. Mayall*, 25 N. H. 82, respectively. So where an infant agreed to accept in part payment for his services an order upon a third person for cloth, he is not bound by the receipt of the order, but may avoid the contract, and recover on a *quantum meruit* for the value of his services: *Abell v. Warren*, 4 Vt. 149. And where an infant agrees to work at a certain rate of wages, it being understood that she could leave the employment at any time, she may likewise avoid the express contract, and recover the value of her services rendered upon a *quantum meruit*: *Luskin v. Mayall*, 25 N. H. 82. "The general principle undoubtedly is," says Bell, J., in this last case, "that when there is an express contract between parties, the law will not raise any implied contract; but we doubt if this has any application to the case, where the law itself gives to one of the parties the right to avoid the contract by reason of an original and intrinsic defect." There can be no doubt of the right of an infant to recover on a *quantum meruit* what her services rendered are reasonably worth, if her employer has violated his part of the contract, and she leaves the service at his request, and in conformity with her own wishes: *Meeker v. Hurd*, 31 Vt. 639. And, on the other hand, where an infant contracted to work for a year, but left before the expiration of that time, but about a month after he had become of age, it was held that he had ratified the contract by continuing in the service after he became of age, and that if he then left without sufficient cause, he could not recover for the services rendered: *Foreyth v. Hastings*, 27 Vt. 646. In *Aldrick v. Abrahams, Hill & D.* 423, it was held that an infant who had agreed to lease and purchase from the defendants certain premises, and to pay therefor a gross sum and an annual rent, and to erect buildings on the premises of sufficient value to secure the payments, could not, on avoiding the agreement, without having paid or done anything for the defendants, maintain an action against them to recover for the value of the labor done and materials furnished by him in the erection of a building upon the premises, pursuant to the agreement, since he had erected the building for himself.

There has, however, been considerable dispute as to whether the amount of the injury occasioned to the employer by the infant's abandoning the special contract can be deducted from the value of the services rendered by the infant, so that the latter can only recover the difference, if any, in his favor. A *dictum* by Chief Justice Parker, in *Moses v. Stevens*, 2 Pick. 332, to the effect that such a deduction might be made, has been approved, and sometimes actually applied, in several cases: *Thomas v. Dike*, 11 Vt. 273; 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206; *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229; *Lowe v. Sinklear*, 27 Mo. 308. In *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690, Williams, C. J., says. "The court are inclined to adopt this rule [of *Moses v. Stevens*]; and although I have great doubt

whether it is not infringing the general rule of law on the subject of contracts with infants, yet I more readily yield my assent to this course, on principles of policy, when I reflect that so many minors are emancipated by their parents by giving them their time, as it is called, — a practice which, though sanctioned by judicial decisions, I regret has prevailed, — and become adults for the purpose of making contracts, and remain infants to avoid them. It would be unsafe for the community, unless some such principle were adopted. The case under consideration must be decided on this ground."

This view has been condemned, and, we think, properly so; and the correct rule, in our opinion, is, that the damages sustained by the employer by reason of the infant's abandoning the service under the special contract, or otherwise failing to comply with the terms of the contract, cannot be taken into consideration in an action by the infant on *quantum meruit* to recover for the services rendered by him: *Whitmarsh v. Hall*, 3 Denio, 375; *Derocher v. Continental Mills*, 58 Me. 217; 4 Am. Rep. 286; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133. In *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286, Walton, J., uses the following language: "To compel the minor thus to make good the loss occasioned by the non-performance of his contract is virtually to enforce the contract; and thus to enforce the contract is, in effect, to abrogate the rule of law that a minor is not bound by his contract. We presume no one would undertake to maintain that an action would lie against an infant to recover damages for the breach of such a contract; and yet it seems to us that there can be no difference in principle between deducting the damages from the amount which the infant would otherwise be entitled to recover in a suit brought by him, and recovering the same in a suit brought against him." The court criticises a number of cases, among them *Moses v. Stevens*, 2 Pick. 332; but does not refer to its previous case of *Judkins v. Walker*, 17 Me. 38; 35 Am. Dec. 229. It should be carefully noticed that the foregoing rule only excludes damages sustained by the employer by reason of the infant's simple violation of the terms of his contract. If he has been guilty of negligence in the performance of his services, the negligence should plainly be taken into consideration in estimating the value of the services: See *Vehue v. Pinkham*, 60 Me. 142. "It was what his services were reasonably worth, under all the circumstances of the case, that he was entitled to recover. If by his negligence or disobedience of orders he broke his employer's tools or damaged his property, his services were manifestly worth just so much less": *Vehue v. Pinkham*, 60 Me. 142. And plainly, also, if the contract was broken and the service terminated through the fault of the employer, no deduction for the damage he may have sustained in consequence of the infant leaving his employment should be made: *Meeker v. Hurd*, 31 Vt. 639.

If an infant has been fully and fairly compensated for his services, he should certainly not be entitled to claim compensation a second time, and a part payment should also be a discharge to the employer to that extent: See *Holbe v. Godlove*, 17 Ind. 359; *Waugh v. Emerson*, 79 Ala. 295; *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576; *Breed v. Judd*, 1 Gray, 455, 459; compare *Nickerson v. Easton*, 12 Pick. 110. In *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, where an infant agreed to work at a certain rate of wages, and to have his board, it was held he could not repudiate the contract, if it was fair and reasonable, and recover on a *quantum meruit* for the services rendered, he having had his board for the period for which he worked, and some payments of money. Cooley, J., said: "If a contract for service is apparently fair and reasonable under

the circumstances, the infant who has performed it should be held to its terms, and if he attempts to repudiate it, the attention of the jury should be directed to the question whether or not an unfair advantage has been taken of him, instead of their being required to find a subsequent affirmance. So long as the employer who is acting in good faith is not notified of any dissent, he has a right to understand that his responsibility is measured by his agreement. On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to. He is bound by the terms of the contract so far as he executes it without dissent, but no further." In *Breed v. Judd*, 1 Gray, 455, 459, an infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one third of all the avails of his labor during his absence, which he afterwards sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and other money expended for him by the other party in pursuance of the agreement. The court, after discussing the partnership feature of the case (see *ante*, title "Partnership"), said that, viewing the contract as an agreement for the services of the plaintiff for a limited time, to be repaid by the advancement and by retaining also two thirds of the fruits of his labor, it would, if fairly made and fully executed, be within the principles, if not within the direct authority, of *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654. The court, per Thomas, J., continues: "Indeed, to say that an infant could make no contract for his labor, however reasonable and beneficial to himself, by which he should be bound, even when fully executed on both sides, instead of serving as a protection to the infant, would have the effect only to prevent his being employed. Men of business want to know beforehand what they have got to pay, and also to know that when an agreement for labor, reasonable and just, has been justly made and fully executed, and the price paid, there is an end of the matter."

While we agree with the results attained by these latter cases, we do not concur in the reasoning by which those results were reached. We do not believe that the cases can be supported on the mere theory that the contracts, being fully executed, could not be avoided by the infants. If this were so, an infant could not avoid any executed contract, yet it must be conceded that his executed conveyances of realty and sales of personalty may be disaffirmed by him, and the land or the chattels recovered back again. A payment once made to an infant employee should be good so far as it goes. But we would suggest as the reason why there cannot be a second recovery by the infant, that the infant, to disaffirm the previous payment and recover anew, should restore to the employer what he has received; and although he may have parted with the consideration, and would not be obliged to restore an equivalent, or even if he retained the consideration, might perhaps not be compelled to restore it as a condition to maintaining the action, yet what he would now recover, the employer would be entitled to recover back again, and to avoid circuity of action, a second recovery will not be allowed. Furthermore, it seems to us that if the infant were able to show, in any case, that his services were worth more than what he had received according to the terms of his contract, he could, nevertheless, in the exercise of his right of disaffirmance, recover the excess in value. Of course, it is assumed in the foregoing discussion that if the infant has parents, he is permitted by them or by the law to

receive his wages. This question is settled in Iowa by section 2240 of the code, which enacts that "where a contract for the personal service of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor, in accordance with the terms of the contract, is a full satisfaction for those services, and the parent or guardian cannot recover therefor a second time"; under which it is held that the payment is a full satisfaction to the minor as well, who cannot recover a second time for the services: *Murphy v. Johnson*, 45 Iowa, 57.

There is still another line of cases, which has an intimate connection with the one last mentioned, differing from it only in that the services were rendered in consideration of board, clothing, education, and other necessities furnished by the employer. In other words, an infant agrees to render services in consideration of his support and education. While the infant might decline to perform the agreement, and would incur no liability by so doing, yet when the agreement is fairly made and fully executed on both sides, the infant cannot avoid the agreement and recover the value of the services on a *quantum meruit*. The contract may be supported on the ground that it is one for necessities, or it may be upheld on the theory just considered, that the services have been fully paid for: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Squier v. Hydliff*, 9 Mich. 274; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. The case of *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152, might have been decided according to this theory; and perhaps, also, the case of *Breed v. Judd*, 1 Gray, 455, 459, in which, indeed, the question of necessities is somewhat discussed. The contract having been fairly made, the infant cannot recover merely by showing that it turned out that his services were worth more than the agreed compensation: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. Thus in *Wilhelm v. Hardman*, 13 Md. 140, Tuck, J., says: "It was urged in argument that the services might be worth more than the support furnished, and that the employer would thereby obtain an advantage over the infant. This may occur in some cases; but we must remember that the infant may leave the employment of his own caprice, or whenever he can procure better returns for his labor. The employer is subject to his will. If this reason did not apply, we think it more in accordance with the policy of the law, in reference to infants, that they should be held bound by their contracts of this kind, as far as performed, than to offer inducements to them to obtain employment with persons acting in good faith, and afterwards suffer compensation, not contemplated by the other party at the time of the agreement." In this case of *Wilhelm v. Hardman*, 13 Md. 140, the infant agreed with the defendant to work and labor for the latter on his farm, for seven years, in consideration that the defendant should provide him necessary food, lodging, and clothing, and give him schooling when there was a school convenient, and that if he remained and worked for the seven years, the defendant would give him a horse, saddle, and bridle in addition. It was held that the item in regard to the horse and equipments was something over and above the support, and the infant could not aver it to avoid the contract *in toto*. See also *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152.

The case of *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, is said to have been overruled by *Dallas v. Hollingsworth*, 3 Ind. 537, and by subsequent cases: See *Wheatly v. Miscal*, 5 Ind. 143; *Van Pelt v. Corwine*, 6 Ind. 364; *Garner's Adm'r v. Board*, 27 Ind. 326; but while some of the reasoning in *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, respecting executed con-

tracts of minors is to be condemned, the decision, in our opinion, is correct, and in accordance with the weight of authority. We think that the case was not overruled by *Dallas v. Hollingsworth*, 3 Ind. 537, but that the latter case has been entirely misconstrued by the Indiana court. *Dallas v. Hollingsworth*, 3 Ind. 537, simply involved the right of an infant to abandon his special contract, and recover on a *quantum meruit* for the services performed, and *Harney v. Owen*, 4 Blackf. 337, 30 Am. Dec. 662, which was a different case entirely, was not even referred to. In accordance with this misconception of the effect of *Dallas v. Hollingsworth*, 3 Ind. 537, it was erroneously held in *Wheatly v. Miscal*, 5 Ind. 143, that where an infant agreed to work for a certain time, in consideration of which his employer was to furnish him with board and clothing, and send him to school, and at the end of the time was to pay him a certain sum of money, if the infant quit before the expiration of the agreed time, he could recover for the value of the services up to the time he quit. The question of a portion of the consideration for the services being necessities was not even noticed. It will be seen that the case bears a very close resemblance to *Wilhelm v. Hardman*, 13 Md. 140, and *Squier v. Hydliff*, 9 Mich. 274, which were decided to the contrary. A similar view, in part, was taken in *Locke v. Smith*, 41 N. H. 346, in which it was held that where an infant renders services in return for support and education given him, he could not, after coming of age, repudiate the contract, so as to recover pay for his labor, without allowing anything for his support and education.

In *Mountain v. Fisher*, 22 Wis. 93, the court held that an infant who lives with and works for another person upon a mutual understanding that his services were rendered in consideration of receiving a home, food, clothing, care, and attention, such as a child of such other person would reasonably be entitled to, and who was in fact so treated, could not recover for his services, but placed its decision upon the ground that the services were not rendered in expectation that they would be paid for. But, on the other hand, it is held, in Indiana, that the rule that where a person resides with another as a member of his family, being supported as such, and rendering services in return, there is no implied contract to pay for such services, does not apply where the person is an infant; for, since an infant can avoid his special contract, and recover the reasonable value of his labor, his conduct and acts could not create an implied contract which would operate against him to bar his right of action; but, it is held, the reasonable value of necessities furnished the infant during the period of such service may be allowed the defendant: *Garner's Adm'r v. Board*, 27 Ind. 323; *Meredith v. Crawford*, 34 Ind. 399; the last case, however, giving as the reason that "the plaintiff, having been an infant at the time, was not bound by any special contract as to the time that she was to work, or the amount to be paid her therefor." It may be said of these cases that there is absolutely no difference in principle, whether the parties have expressly agreed that the services were to be compensated for in support, or whether such is their understanding, implied from their acts and conduct. In neither case should the infant be permitted, on the mere ground of infancy, to disregard the agreement so far as it has been executed, and recover for his services. These Indiana cases are nearly as erroneous as *Wheatly v. Miscal*, 5 Ind. 143, which they really follow.

Finally, if an infant has been furnished with necessities, while working with a mechanic, to learn his trade, upon an action of *assumpsit* brought against the infant for the value of the necessities, it is a good defense under

the plea of *non assumpsit* that the defendant's services were equal to or exceeded in value the necessities furnished: *Francis v. Felmit*, 4 Dev. & B. 498.

APPRENTICESHIP. — It has been said that an infant may bind himself an apprentice, because such a contract was for his benefit: See note to *Brotman v. Bunnell*, 34 Am. Dec. 538; *Rex v. Inhabitants of Arundel*, 5 Maule & S. 257; *Rex v. Inhabitants of Great Wigton*, 3 Barn. & C. 484, 486; 5 Dowl. & R. 339. Yet it should be observed that whatever binding force a contract of apprenticeship may have is due to statute. The contract, at common law, is voidable by the infant, like his other contracts: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. An indenture by which an infant, with the consent of his father, bound himself apprentice to a tradesman, "his executors and administrators, such executors or administrators carrying on the same trade or business, and in the town of Wolverhampton," for the term of seven years, and the master, in consideration of the service of the apprentice, covenanted to teach and instruct him, or cause him to be taught and instructed, during the term, was held, in England, binding upon the infant, upon the death of the master, since it was not for the infant's disadvantage to remain in the service of the personal representatives, and for unlawfully absenting himself from the service of the executrix, he might be punished under the act 4 George IV., chapter 34: *Cooper v. Simmons*, 7 Hurl. & N. 707; but where an infant was apprenticed by a deed containing a provision that the master should not be liable to pay wages to the apprentice so long as his business should be interrupted or impeded by or in consequence of any turn-out, and that the apprentice might during any such turn-out employ himself in any other manner or with any other person for his own benefit, it was held that this provision, not being for the benefit of the infant, the apprentice deed could not be enforced against the infant under the Employees and Workmen Act, 1875, 38 and 39 Victoria, chapter 90: *Meakin v. Morris*, L. R. 12 Q. B. D. 352.

While an infant's contract of apprenticeship executed according to statutory requirements may subject the infant to the control and discipline of the master, to the penalties prescribed by statute for the misconduct of apprentices, and may confer a settlement on the infant under the poor-laws, and the like, yet, unless perhaps the statute otherwise provides, no action can be maintained by the master, against the infant, for damages for breach of the covenants contained in the indenture, if the plea of infancy is interposed: *Gylbert v. Fletcher*, Cro. Car. 179; *Lylly's Case*, 7 Mod. 15; *McNight v. Hogg*, 1 Const. S. C. 117; and see *Moses v. Stevens*, 2 Pick. 332, 335. The contrary was held in *Woodruff v. Logan*, 6 Ark. 276; 42 Am. Dec. 695; and in *Horn v. Chandler*, 1 Mod. 271, it was decided that an infant, unmarried, and above the age of fourteen years, might bind himself apprentice to a freeman of London; and by the custom of that city, the master might have the same remedies against him on the covenants of the indenture as if he had been of full age; "though such a covenant shall not bind an infant, either by common law, or by 5 Elizabeth, chapter 4, yet by this custom it shall": *Horn v. Chandler*, 1 Mod. 271.

Infancy is certainly a good defense to an action on the agreement to serve the plaintiff as an apprentice, if the agreement is not made in pursuance to the statute relating to apprentices: *Frazier v. Rowan*, 2 Brev. 47. And, on the other hand, it is no defense to an action to recover the value of work and labor performed by the plaintiff while an infant, for the defendant to show that the services were rendered under articles of indenture purporting to bind the plaintiff to the defendant as an apprentice, if the articles are in-

valid because not executed in conformity with the statutory requirements: *Tague v. Hayward*, 25 Ind. 427; *Hunsucker v. Elmore*, 54 Ind. 209; *Kerwin v. Myers*, 71 Ind. 359; see also *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662; *Davies v. Twrton*, 13 Wis. 185. And if there is no statute, since the contract of apprenticeship is not binding at common law, and since the statute of 5 Elizabeth, chapter 4, cannot be regarded as in force in this country, it being opposed to the genius and spirit of our institutions, the contract may be ended at the pleasure of the infant; and, therefore, to an action for falsely and maliciously representing to certain persons, with whom the plaintiff was employed, that the plaintiff was defendants' apprentice, by means whereof the plaintiff was discharged from an employment, a plea of justification by defendants setting up a contract of apprenticeship with the plaintiff, who was a minor, was held properly sustained: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777.

The contract of apprenticeship is not binding if the infant is not a party thereto, unless, perhaps, the statute should provide that it might be executed in his behalf by his parents or guardian: *Commonwealth ex rel. Murray v. Moore*, 1 Ashm. 123; *Pierce v. Massenbury*, 4 Leigh, 493; 26 Am. Dec. 333; *Stringfield v. Heiskell*, 2 Yerg. 546; *Irwin v. Norcross*, 3 N. J. L. 97; *Matter of McDowle*, 8 Johns. 328; *Balch v. Smith*, 12 N. H. 437; *Re v. Inhabitants of Arnesby*, 3 Barn. & Ald. 584. No limitation of time may be prescribed by the statute within which an infant is incapable of binding himself by indenture of apprenticeship: See *Brotzman v. Bunnell*, 5 Whart. 128; 34 Am. Dec. 537.

An indenture of apprenticeship of an infant, it is held in England, may be put an end to when it is for the benefit of both parties, because of the master's running away and leaving the apprentice: *Re v. Inhabitants of Mountsorrel*, 3 Maule & S. 497. In *Re v. Inhabitants of Great Wigston*, 3 Barn. & C. 484, 486, Abbott, C. J., said: "It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract. If, then, it be for the benefit of the infant to bind himself an apprentice, it is impossible to say, generally, that it is for his benefit to dissolve such connection; such a position involves a contradiction. That being the general rule, we must inquire whether in the particular instance it is for the advantage of the infant to dissolve his apprenticeship." In this case it was held that no facts being stated from which it could be inferred that it was for the infant's benefit to put an end to the apprenticeship, it could not be considered dissolved, and therefore a second apprenticeship was invalid, and no settlement could be gained by service under it.

Finally, it may be observed that the provisions of the particular statute in question must be examined, in order to ascertain the extent of the binding force of a contract of apprenticeship upon an infant.

CONTRACTS TO MARRY. — While an infant of a certain age, at the common law, and under various state statutes, is capable of consenting to marriage, and the marriage of an infant of proper age actually contracted and solemnized is valid and binding, and cannot be disagreed to or avoided on the ground of infancy, yet the mere promise to marry of infant is not binding upon him, and hence infancy is a good defense to an action against him for the breach of the promise to marry: *Hale v. Ruthven*, 20 L. T. 404; *Pool v. Pratt*, 1 Chip. 252; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Warwick v. Cooper*, 5 Saeed, 659; *Rush v. Wick*, 31 Ohio St. 521; 27 Am. Rep. 523;

Hamilton v. Lomax, 26 Barb. 615; and in an action for breach of promise of marriage, infancy, it is held, is admissible in evidence under the general issue: *Morris v. Graves*, 2 Ind. 354. In *Pool v. Pratt*, 1 Chip. 252, the court says: "A contract of marriage by an infant and his contract for necessities are perfectly analogous; in both cases the contract when consummated is binding, but while executory, is not binding." The contract is not void, but is simply voidable by the infant, at his election. Therefore, the adult party to the contract is bound, and the infancy of the plaintiff is no defense to an action for breach of promise against the adult: *Holt v. Ward Clarendieux*, 3 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; and see also *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475. This would be true under any view of the nature of an infant's general contracts.

It is held that the second section of the Infants' Relief Act, passed by the English Parliament in 1874, noticed *ante*, under the head "Statutory Regulation," concerning the ratification of infants' contracts, applies to promises of marriage. And therefore, where the defendant, during his infancy, promised to marry the plaintiff, and after coming of age, recognized, without expressly repeating, the promise, and eventually broke it, it was held that the plaintiff was properly nonsuited in an action for breach of promise; for assuming that there was a ratification of the promise subsequent to his majority, the right of action was taken away by the above section, and there was no evidence of any fresh promise made after the defendant came of age: *Coxhead v. Mallis*, L. R. 3 C. P. D. 439. But in *Northcote v. Doughty*, L. R. 4 C. P. D. 385, the defendant, during his infancy, made an offer of marriage to the plaintiff, which she accepted subject to the approval of his parents. He afterwards gave her an engagement ring, which she wore, and two days before he attained his majority, he went into the country to visit his father, and on his return, the day after he came of age, he saw the plaintiff and told her that he had explained all to his father, and that he assented to the engagement, the defendant adding that now he might and would marry the plaintiff as soon as he could. It was held that it was properly left to the jury to say whether this was a fresh absolute promise to marry, or merely a ratification of the original promise made during infancy, so as to be avoided by the operation of the second section of the above act. It was also held, in *Ditcham v. Worrall*, L. R. 5 C. P. D. 410, that a fresh promise of marriage, made after the defendant came of age, was binding; but that a mere ratification of the original promise, made after coming of age, was not binding under section 2 of the act.

In *Devlin v. Riggsbee*, 4 Ind. 464, it was held that where, by statute, females of the age of eighteen were competent to contract marriage, a female of the age of eighteen might, as incident to such capacity, make a valid and binding release of a party from a contract to marry her.

GIFTS. — A transfer of his property by an infant by way of gift is, of course, not a contract, but its validity may properly be noticed in connection with this subject of contracts of infants. If an infant may avoid his contract whereby his property, real or personal, has been transferred, he, or his personal representatives in case of his death, should plainly have the right to avoid his gift of such property on the ground of his infancy: *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630; *Holt v. Holt*, 59 Me. 464. And in *Swafford v. Ferguson*, 3 Lea, 292, 31 Am. Rep. 639, it was held, approving the criterion of Lord Chief Justice Eyre, that a deed executed by infants without consideration, being necessarily to their prejudice, was void, and being void, and

not voidable, they could consequently maintain a bill during their infancy, by their next friend, to set the deed aside. But it was held, with better reason, that a deed of gift of a slave, executed by an infant in trust for his children, was not void, but voidable only: *Slaughter v. Cunningham*, 24 Ala. 260; 60 Am. Dec. 463. An infant who executes, without consideration, and as a gift, a deed, in which, by mistake, the land was incorrectly described, cannot, very plainly, be compelled, after attaining his majority, to execute a deed for the land intended to be conveyed, although after arriving at age he promised to do so, the promise being without consideration: *Oxley v. Tryon*, 25 Iowa, 95.

DELEGATION OF AUTHORITY. — In a number of early cases, both in England and in this country, it has been said that an infant's warrant of attorney to confess a judgment was absolutely void: *Sanderson v. Marr*, 1 H. Black. 75; *Wood v. Heath*, 1 Chit. 708, note; *Ashlin v. Langton*, 4 Moore & S. 719; *Bennett v. Davis*, 6 Cow. 393; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Carnahan v. Allderdice*, 4 Harr. (Del.) 99; *Knox v. Flack*, 22 Pa. St. 337; but it seems, at least so far as these cases show anything at all, that this statement means nothing more than that the court would set the judgment aside at the instance of the infant. In other words, the infant might avoid the warrant of attorney and the judgment founded thereon; but we do not understand these cases as holding that the judgment is good for no purpose and at no time at all, which, of course, would be the condition of affairs if it were absolutely void. In *Oliver v. Woodroffe*, 4 Mees. & W. 650, a cognovit given by an infant, authorizing an attorney to appear for him, and confess an action brought against him for the precise sum for necessities provided him by the plaintiff, with an undertaking "not to bring any writ of error, nor do any act to prevent the plaintiff from entering up judgment or suing out execution," was held by Lord Abinger to be void, for three reasons: "1. It is bad because it falls within the principle which prevents an infant from appointing and appearing in court by attorney; he can appear by guardian only. 2. By this means the minor is made to state an account, which the law will not allow him to do, so as to bind himself; if an action be brought against him, the jury are to determine the reasonableness of the demand made. 3. The general principle of law is, that a minor is not to be allowed to do anything to prejudice himself or his rights"; but here, again, the question was simply as to the right of the infant to have the proceedings taken under the cognovit set aside. The reason why an infant cannot be absolutely held on an account stated for necessities has already been noticed: See *supra*, "Account Stated."

With respect to an infant's formal power of attorney, or any mere and less technical appointment of an agent, for other purposes, it has been actually decided in some cases, but more frequently asserted by way of *dictum*, that the delegation of authority is not simply voidable, but absolutely void: *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Dexter v. Hall*, 15 Wall. 9, 25; *Philpot v. Bingham*, 55 Ala. 435; *Fleazner v. Dickerson*, 72 Ala. 318, 322; *Cole v. Pennoyer*, 14 Ill. 158; *Hiestand v. Kuna*, 8 Blackf. 345; 46 Am. Dec. 481; *Tapley v. McGee*, 6 Ind. 56; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; *Pickler v. State*, 18 Ind. 266; *Fetrow v. Wiseman*, 40 Ind. 148, 155; *Pyle v. Cravens*, 4 Litt. 17; *Semple v. Morrison*, 7 T. B. Mon. 298; *Dana v. Coombs*, 6 Me. 89, 90; 19 Am. Dec. 194, 195; *Wainwright v. Wilkinson*, 62 Md. 146; *Armitage v. Widoe*, 36 Mich. 124, 129; *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77; *Bool v. Miz*, 17 Wend. 119; 31 Am. Dec. 285; *Robbins v. Mount*,

4 Rob. (N.Y.) 553; *Brown v. Town of Canton*, 4 Lans. 409; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Turner v. Bondalier*, 31 Mo. App. 582.

If, then, according to these authorities, an agent be appointed by an infant for the purpose of making a contract in his behalf, the appointment being void, the contract entered into pursuant to it must necessarily also be void. The result is, that the contract would be good for no purpose whatever, and would be incapable of ratification by the infant after coming of age. And this has been so decided. Thus in *Doc ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781, Baron Parke says: "An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is no doubt about the law; the lease of an infant, to be good, must be his own personal act." So it is held that a bond for title, executed by the agent of an infant, cannot be ratified by him after attaining majority: *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; see also *Wainwright v. Wilkinson*, 62 Md. 146. In *Philpot v. Bingham*, 55 Ala. 435, and *Lawrence's Lessee v. McArter*, 10 Ohio, 37, it was said that an infant's power of attorney to sell lands, under which the lands were sold and conveyed, was absolutely void, and consequently no title passed under the conveyance; but this was only a *dictum* in either case; for in *Philpot v. Bingham*, 55 Ala. 435, the infant had brought an action to recover possession of the land, and the question involved was simply his right to disaffirm the deed; and in *Lawrence's Lessee v. McArter*, 10 Ohio, 37, the action was ejectment, the defendant claiming title under the conveyance executed in pursuance of the power of attorney, and the plaintiff under a deed executed to him by the infant after coming of age, which, of course, had disaffirmed the prior deed. And in *Pyle v. Cravens*, 4 Litt. 17, it was also said that if an infant son executes a power of attorney to his father, authorizing the latter to dispose of the son's claim in certain land, the power of attorney was absolutely void, and could not be enforced against the son. Of course, it could not be enforced against the son's defense of infancy. In *Semple v. Morrison*, 7 T. B. Mon. 298, the assignment of a note belonging to an infant, by an agent, was held to be void, the court saying: "It is true, the assignment to Semple appears not to have been made under any written warrant [power] of attorney; but if, as the doctrine of the law seems to be, acts done under warrants of attorney are void because infants are disabled from appointing an attorney, the result must be the same, whether the attorney be appointed by warrant of attorney, strictly so called, or by parol." And in *Fonda v. Van Horne*, 15 Wend. 631, 30 Am. Dec. 77, a sale of chattels made by the agent of an infant was likewise held void; see also *Stafford v. Roof*, 9 Cow. 626, 627, per Jones, Chancellor.

In *Brown v. Town of Canton*, 4 Lans. 409, a direction by an infant to town authorities to deliver certain town-bounty certificates, to which he was entitled on enlisting as a soldier, to his father, and when due to pay them to the latter, was also asserted to be void; and although the town paid the amount of the certificates to the assignee of the father, it was held that the infant was to be regarded as still owning the certificates, and entitled to recover upon them from the town. It is plain that the case simply involved the right of the infant to disaffirm the transaction. For a case in which the opposite result was reached, on a somewhat similar state of facts, on the ground that the agency had been executed before a revocation was attempted by the infant, see *Welch v. Welch*, 103 Mass. 562. In *Armitage v. Widoe*, 36 Mich. 124, a father made a contract for the purchase of lands in the name of his infant son, without the knowledge of the latter. The son claimed the

right to disaffirm the contract and recover back the money which his father had paid under it, on the ground that he had assented to the contract, on being informed of it. It was held that he could not adopt the contract and recover; for, says Cooley, C. J., "had the infant, in the first place, undertaken to make another his agent to enter into the contract for him, the appointment would not have been valid. On the authorities, no rule is clearer than that an infant cannot empower an agent or attorney to act for him. But if he cannot appoint an agent or attorney, it is clear he cannot affirm what one has assumed to do in his name as such. He cannot affirm what he could not authorize." It seems to us that this language, as applied to the facts of the case, was wholly unnecessary. It does not appear that the infant assented to the contract made in his name, so far as to return, or promise to return, to his father the money advanced by the latter; and as he did not, any rights asserted by him under the contract were really claimed by him as a gift from his father. If he had returned the money to his father, or even agreed to return it, and thus have fully adopted the contract, we do not see why he could not have afterwards repudiated the contract, and recovered the money paid to the defendant. The court went on to hold, with more correctness, that, treating the act of the father as a gift to the son, the son was not entitled to recover back the money paid; for the contract was valid in the father's hands, and could not be repudiated by him, and he could not empower another to do what he could not do himself.

In California and Dakota, as already seen, an infant's "delegation of power" is made by statute absolutely void: Cal. Civ. Code, sec. 33; Dak. Civ. Code, sec. 15; *ante*, "Statutory Regulation"; *Wainbale v. Foote*, 2 Dak. 1, the court in this case saying: "This particular disability, after all, works no hardship, but rather a benefit; for the disposition of the infant's property is perhaps better secured through a guardian, under the control of a court,"—a nonsensical apology for the rule, and the legislation which, the court says, "preserves" it; for the same remark would apply to contracts of an infant, rendering them equally void.

It is thus seen, from an analysis of the decisions, that, independently of statute, there is in truth but very little real authority in support of the proposition that an infant's delegation of authority, and contracts made in pursuance of it, are void; and among all the cases which exist in favor of the rule, not one is sustained by any reasoning whatever. The notion that an infant's appointment of an agent is void seems to have originated with Perkins's senseless criterion: "All such gifts, grants, or deeds made by an infant as do not take effect by delivery of his hand are void. But all gifts, grants, or deeds made by an infant by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable": Perkins on Conveyancing, sec. 12; see *supra*, "Void and Voidable"; or perhaps we should say that the notion originated in the interpretation put upon this passage by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, 1804, who says that "the words 'which do take effect' are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest." From "letters of attorney" the transition to all delegations of authority was an easy one; and we find case after case repeating the *dictum* that an infant's power of attorney or appointment of an agent is void, without stopping to inquire the reason why. Even cases which have otherwise correctly announced that none of an infant's general contracts were void by reason of his nonage have sometimes carelessly said that an infant's appointment of an agent was void, and have thus made an exception where the contract was

entered into by means of an agent: See *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155; also *Roof v. Stafford*, 7 Cow. 179, 180; *Stafford v. Roof*, 9 Cow. 626, 627; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285. In *Fetrow v. Wiseman*, 40 Ind. 148, 155, the court contents itself with saying that the proposition "may not be founded in solid reason, but is so held by all the authorities."

Whenever the question has been at all examined, the courts have usually reached the conclusion that an infant's appointment of an agent, and a contract made under it, are not void, but that the contract stands on exactly the same footing as a contract entered into by the infant personally. Thus Chief Justice Parker held at an early day, in *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, that an infant may authorize a person to execute a promissory note on his behalf, the delegation of authority not being void, and therefore the note might be ratified by the infant after coming of age. Furthermore, this authorization need not be express, but might result from a partnership relation existing between the infant and another person, who executed the note in the name of the firm for a firm debt. We cannot do better than to quote from the able opinion of the learned chief justice. He says: "Upon principle, what difference can there be between the ratification of a contract made by the infant himself, and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it? It may be said that minors may be exposed if they may delegate power over their property or credit to another; but they will be as much exposed by the power to make such contracts themselves, and more for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources that infants cannot be prejudiced; for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them." The learned justice, however, with more care than necessary, avoids the question whether an infant can confer an authorization to do an act under seal, saying: "Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void, although no satisfactory reason can be assigned for such a position." We might here observe that several cases noticed *supra*, under the head "Partnership Agreements and Transactions," which hold that an infant may ratify a partnership contract so as to be liable thereon, must necessarily assume, even if they do not decide, that an infant's appointment of an agent is not void: See particularly *Miller v. Sims*, 2 Hill (S. C.) 479.

In conformity with this case of *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, it has been held that if an infant payee of a promissory note authorizes a person to indorse and transfer the note for him, the transfer so made is not void, but is valid until avoided, the authorization not being void, but voidable only: *Hardy v. Waters*, 38 Me. 450; and that the same rule applies to a non-negotiable note: *Hastings v. Dollarhide*, 24 Cal. 195. Again, it is held that the fact that an infant notified his vendee of personal property of his election to rescind the contract of sale, offered to return the consideration, and demanded a restoration of the property, through an agent, was no defense to an action of trover by the infant against the vendee to recover back the property, the acts of the agent not being void, but, at most, voidable, at the election of the infant: *Towle v.*

Stiff v. Keith, 143 Mass. 224, it was held that a contract with the agent of an undisclosed principal could not be rescinded by the bailee on the ground which, of course, might have been done had the contract as real property is concerned, *Hemphill, C. J.*, 8 Tex. 80, 88, in commenting upon the opinion in *Mass. 457*, 7 Am. Dec. 229: "The justness of this opinion is very striking, and they apply to the condition of property in this state. The lands of Indians are frequently situate in counties remote from each other and from the residence of the owner. It is a matter of great convenience, if not absolute necessity, that sales should be effected by agents, and it seems quite preposterous that a sale by a minor, which must necessarily or may conveniently be made through the intervention of an attorney in fact, should be void, but if made by himself would be only voidable. His infancy, instead of operating beneficially, would, under such circumstances, be perverted to his injury. If the act be void, it is not binding on others; and if the property depreciate after the sale, it might be thrown back upon his hands, and his infancy would then be turned against him, and instead of shielding himself, would protect others." See also *Ferguson v. Houston etc. Ry Co.*, 73 Tex. 344, 347; but see *Voglesang v. Null*, 67 Tex. 465; *Askey v. Williams*, 74 Tex. 294.

It seems to us, furthermore, contrary to the opinion expressed by Cooley, C. J., in *Armitage v. Widoe*, 36 Mich. 124, that an infant may adopt a contract made in his name by one who acted without previous authority. There is no difference in principle whether the authority is previously expressly conferred or is subsequently ratified. In *Ward v. Steamboat Little Red*, 8 Mo. 358, it was said that "an infant can become a party to a contract made without authority from him, by his subsequent adoption of it, as well as by his previous express consent"; and in *Alexander v. Heriot*, Bail. Eq. 223, it was held that if one makes a purchase for an infant, avowedly as agent, if the infant affirm the contract after attaining full age, he will be directly liable to the vendor. It must be said, however, that the question under consideration does not seem to have been distinctly raised in either of these cases.

An infant, of course, may be an agent, and, as such, bind his principal: *Talbot v. Bowes*, 1 A. K. Marsh. 436; 10 Am. Dec. 747.

INFANT'S CONCEALMENT OR MISREPRESENTATION AS TO AGE, ETC. — The question next presents itself as to what effect, if any, is produced upon the general contracts of an infant by the fact that he has dealt as an adult, or made false representations as to his age or other matters, whereby the other party was induced to enter into the contract. In the first place, it is perfectly well settled at law that the general contract of an infant, otherwise voidable, cannot be enforced against him because he dealt or traded as an adult. He is not thereby estopped from pleading his infancy as a defense: *Miller v. Blankley*, 38 L. T. 527; *Van Winkle v. Ketcham*, 3 Caines, 323; *Houston v. Cooper*, 3 N. J. L. 866; *Curtin v. Patton*, 11 Serg. & R. 305, 309; *Oliver v. McClellan*, 21 Ala. 675; *Carpenter v. Pridgen*, 40 Tex. 32, 35; *Folds v. Allard*, 35 Minn. 488, 489; nor is he estopped from disaffirming his deed, and maintaining an action to recover the land conveyed, by the fact that when the deed was executed he appeared and was believed by the grantee to be an adult: *Buchanan v. Hubbard*, 96 Ind. 1. Nor even is his contract rendered binding at law, so that a recovery can be had against him thereon, from the fact that he falsely represented himself to be of full age at the time the con-

tract was made, and the other party relied upon such representation in entering into the contract: *Bartlett v. Wells*, 1 Best & S. 838; *De Roo v. Foster*, 12 Conn. B., N. S., 272; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Conros v. Birdsall*, 1 Johns. Cas. 127; 1 Am. Dec. 105; *Brown v. McCune*, 5 Sand. 224; *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412. "A contrary doctrine," says Sandford, J., in *Brown v. McCune*, 5 Sand. 224, "would overturn the whole law relative to the contracts of infants. From holding that an infant was estopped by a falsehood as to his age, the next step would be to hold him estopped by a suppression of the fact that he was under age, when he was silent on that point, while he knew that the party with whom he was contracting supposed him to be of age. There is no difference between the direct and the inferential falsehood; the one is as fraudulent as the other."

For the same reason, a grantor is not estopped from disaffirming her deed on the ground of infancy, and maintaining an action to recover the land, by a false recital in the deed that she was "unmarried and of age": *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676. So, also, an infant who fraudulently represented himself to be of age may nevertheless disaffirm his contract of sale of goods, and maintain trover against the purchaser for their conversion: *Norris v. Vance*, 3 Rich. L. 164. "An infant is liable for his torts," says the court; "but his tort neither makes valid his void contract, nor takes away his right of disaffirming a voidable one"; nor where an infant makes a purchase of personal property is his right to disaffirm the contract and recover back the purchase price affected by the fact that at the time he made the purchase he falsely represented to the vendor that he was of full age: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678. "To hold that he is estopped by such representations from avoiding the contract by asserting his infancy would be an exception to the law governing this class of cases. Such representations cannot be of any greater force to bind the plaintiff than the contract itself": *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678. And, likewise, a minor's fraudulent representation to a shipping commissioner for a vessel, that he was of age, will not estop him from avoiding his written contract for compensation, and recovering pay on a *quantum meruit*: *Burdett v. Williams*, 30 Fed. Rep. 697.

Again, for like reasons, an action to recover the purchase price of goods cannot be sustained against an infant on the ground of the infant's false representations as to his means of payment and prosperous condition of his business, made to induce the sale and to give him credit, on which the vendors relied: *Studwell v. Shapter*, 54 N. Y. 249; and infancy is a good defense to an action against a person as a secret partner, to recover the price of goods, purchased ostensibly by his co-defendant on the false representations of the infant as to the solvency of the co-defendant, in order that the two might both profit by obtaining the goods: *Vinsen v. Lockard*, 7 Bush, 458; and where an infant perpetrated a fraud, in representing that certain bonds, deposited by him as a margin upon a stock transaction, belonged to himself, it was said: "An infant is liable for his willful torts, and for damages for frauds committed by him; but no fraudulent representation made by an infant can give validity to any contract entered into by him which would otherwise be voidable for his infancy. The action must, in all cases, arise solely upon the tort or wrong committed by him": *Heuth v. Mahoney*, 7 Hun, 100. It will be noticed that the actions in the foregoing cases were not brought to recover damages resulting from the fraudulent representations, or to reclaim the goods sold, but

sought to enforce the contracts which had been made. In *Stoolfoos v. Jenkins*, 12 Serg. & R. 399, a release of her interest in land executed by an infant in collusion with her guardian, having first chosen him guardian for the purpose of cheating the releasees, and then deceived them by persuading them that their title would be confirmed by the release, and thus prevailed upon them to pay her a certain sum of money as her share of the land, was held not to constitute such fraud as would prevent the infant from avoiding the release and recovering the land; for, it was said, the infant did not pretend to be of full age, and the probability was, that, acting under her guardian's influence, she was ignorant of the law, and really supposed that the release would confirm the title of the defendants. And, very plainly, neither the conduct of an infant's mother in inducing certain persons to enter into a contract of apprenticeship with the infant, nor the act of her agent in intentionally drawing, with her knowledge and acquiescence, the contract so as to be insufficient, can estop the infant from avoiding the contract: *Clark v. Goddard*, 39 Ala. 164; 84 Am. Dec. 777.

In equity, also, it is equally well settled as at law that an infant is not estopped from avoiding his contract from the mere fact that he did not disclose his minority at the time he entered into the contract, and the other party believed him to be adult, and dealt with him on that supposition: *Sikeman v. Dawson*, 1 De Gex & S. 90; *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; and see *Davidson v. Young*, 38 Ill. 145; *Pyle v. Cravens*, 4 Litt. 17; *Price v. Jennings*, 62 Ind. 111; *Alvey v. Reed*, 115 Ind. 148; 7 Am. St. Rep. 418. "We think these facts," says the court in *Baker v. Stone*, 136 Mass. 405, "would not estop her from avoiding the mortgage and the note. They do not present the question whether a minor who has induced a person to accept a conveyance of land by false and fraudulent representations that he is of full age may be estopped to disaffirm the conveyance when of age." "In one sense," says Chalmers, J., in *Brantley v. Wolf*, 60 Miss. 420, "it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits, and thereafter to repudiate it to the prejudice of the other party; but legal fraud cannot be predicated of such conduct by a minor, where it has been unmarked with any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability; and of this right all men are bound to take notice." Again, says Dargan, C., in *Rivers v. Gregg*, 5 Rich. Eq. 274, 279, "he who deals with an infant is presumed to know of his infancy. He is bound, at his peril, to make the inquiry. It makes no difference whether the inquiries result in correct information, or the reverse. It is no excuse if he honestly supposed, from his appearance or other circumstances, that the infant was an adult." See further, on the question that it is not a fraud, either at law or in equity, for an infant to disaffirm his contract, *Tucker v. Moreland*, 10 Pet. 59, 77; 1 Am. Lead. Cas. *224, *234, per Story, J.; *Clamorgan v. Lane*, 9 Mo. 442, 471; *Burns v. Hill*, 19 Ga. 22; *Seabrook v. Gregg*, 2 S. C. 68.

If, however, an infant is guilty of something more than a mere failure to disclose his infancy at the time the contract is entered into, and fraudulently represents that he is of full age, or actively conceals his minority, whereby the other party is induced to enter into the contract, then it is held the infant will be estopped in equity by his fraud from avoiding the contract on the ground of infancy, to the prejudice of the other contracting party: *Ferguson v. Bobo*, 54 Miss. 121; and see *Davidson v. Young*, 38 Ill. 145; *Conroe v. Birdsell*, 1 Johns. Cas. 127; 1 Am. Dec. 105; but see *Geer v. Hooy*, 1

Root, 179; *Sims v. Everhardt*, 102 U. S. 300. In *Ferguson v. Bobo*, 54 Miss. 121, Chalmers, J., says: "It may be stated as a general proposition, fully borne out by the authorities, that whenever an infant who has arrived at years of discretion, by direct participation, or by silence when he was called upon to speak, has entrapped a party, ignorant of his title or of his minority, into purchasing his property from another, he will be estopped, in a court of chancery, from setting up such title"; and therefore, where an infant nineteen years of age, knowing her rights, conveyed land to her father for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of her minority, and subsequently the father conveyed the land to the mortgagee to pay the debt, the mortgagee being still ignorant of the daughter's minority, it was held that a court of equity would restrain her from asserting a claim to the land in an action of ejectment after her arrival at full age. In *Lemprière v. Lange*, L. R. 12 Ch. D. 675, it was also held that where an infant obtained a lease of a furnished house on an implied representation that he was of full age, the lease would be declared void and canceled at the suit of the lessor, and possession of the house ordered to be given up, and the defendant restrained by injunction from parting with the furniture, but that the defendant would not be liable for use and occupation. If equity will thus aid a party with whom the infant has contracted, it certainly should not assist an infant *feme covert* to set aside a deed made by her of her lands, against an innocent purchaser, who was induced to part with his money on the faith of an oath made by herself and husband before a notary that, to the best of their knowledge and information, she was then more than twenty-one years of age: *Schnitheimer v. Eisenman*, 7 Bush, 296.

The party contracting with the infant must, of course, be deceived by the fraud of the infant, in order that the rule may operate. Therefore a settlement executed by an infant in contemplation of marriage was held not binding upon him, because he had falsely represented to the solicitor, before executing the instrument, that he was of age, it appearing that the intended wife knew that he was not of age, and was consequently not deceived: *Nelson v. Stocker*, 4 De Gex & J. 458; and so where an infant *feme covert* relinquished her dower, she is not estopped from disaffirming her deed by the fact that she declared herself to be of age to the officer who took her acknowledgment, there being no proof that such declaration was communicated to the party to be affected, and formed the inducement to the contract, or misled him to enter freely upon it: *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1. And in determining whether a person was deceived, or was justified in relying upon the representations, the appearance of the infant is, of course, a very material matter. For, says Sir George Jessel, M. R., in *Ex parte Jones*, L. R. 18 Ch. Div. 109, 120, "if the representation were made by a boy of ten years old, it would be impossible that the person to whom it was made could have relied on it. But if a man who is apparently of full age represents that he is of full age, the person to whom he makes the representation may well be deceived by it. An infant is capable of committing a fraud in equity just as he is capable of committing a crime, and may be made liable for it. But the authorities show that there must be an express representation, and one which would naturally deceive the person to whom it is made." It is held, furthermore, that the fact that an infant induced a person to purchase his land on the faith of his representation that he was of full age could not avail such purchaser in a contest between him and an innocent purchaser to whom the infant conveyed the land after coming of age: *Vallandigham v. Johnson*, 85 Ky. 288.

It has also been shown, *supra*, "Trading Contracts," that an infant might be declared a bankrupt with respect to debts contracted on the faith of representations or a holding out that he was of full age, such debts being binding upon the infant in a court of bankruptcy, which acts upon equitable principles: *Ex parte Watson*, 16 Ves. 265; *Ex parte Bates*, 2 Mont. D. & D. 337; *In re Unity etc. Banking Ass'n*, 3 De Gex & J. 63; compare *In re Rainey*, 3 L. R. Ir. 459; but, on the other hand, a debtor who had simply traded during infancy could not, for that reason, be adjudicated a bankrupt: *Ex parte Moule*, 14 Ves. 602; *Ex parte Jones*, L. R. 18 Ch. Div. 109, overruling *Ex parte Lynch*, L. R. 2 Ch. Div. 227.

In Georgia, it is provided by section 2733 of the code (1882), that "if an infant, by permission of his parent or guardian, or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business"; Code 1882, sec. 2733; *McKamy v. Cooper*, 81 Ga. 679; but it is held that a minor, who is a mere clerk, is not engaged in a business, within the meaning of this section, so as to make him responsible for his contracts; and even if this were not so, he would not be liable for the price of a buggy purchased by him, in the absence of evidence that he used the buggy or bought it to use in the business of clerking: *Howard v. Simpkins*, 70 Ga. 322. In Indiana, it is provided by a statute passed in 1881 (2 R. S. 1888, sec. 2945): "In all sales of real estate by an infant, he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age." In Iowa and Kansas, it is enacted that "no contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting"; Iowa Code, sec. 2239; Kan. Comp. Laws 1885, sec. 3478; *Oswald v. Broderick*, 1 Iowa, 380; *Prouty v. Edjar*, 6 Iowa, 353; *Dillon v. Burnham*, 43 Kan. 77. This provision is not to be limited, in its effects, to the particular business in which the minor may be engaged, but applies to any contracts he may make: *Jaques v. Sax*, 39 Iowa, 367. To render the infant who engages in business as an adult liable, his infancy must have been unknown to the party contracting with him: *Beller v. Marchant*, 30 Iowa, 350; and the language "capable of contracting" means "legally capable of contracting," and not that the minor is mentally and physically capable of contracting: *Burgett v. Barrick*, 25 Kan. 528.

As to an infant's liability for his frauds and other torts connected with his contracts, see *post*, "Torts of Infants Connected with Contracts."

EMANCIPATION. — The fact that an infant is emancipated by his parent, or allowed to shift for himself, does not impart any additional validity to his general contracts; or in other words, render his contracts, otherwise voidable, absolutely binding upon him. He may still take advantage of his infancy, as before. The effect of the emancipation is simply to release him from the parent's control, and to give him the right to his own earnings: *Mason v. Wright*, 13 Met. 306; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; *Tandy v. Masterson's Adm'r*, 1 Bibb, 330. The same is true with reference to his gifts: *Person v. Chase*, 37 Vt. 647; 88 Am. Dec. 630.

MARRIAGE.—The marriage of a male infant, while it may remove him from his parents' control, and give him the right to his earnings, does not remove the disability of infancy, and render his general contracts any the more binding; nor is the condition of infancy removed from a female infant by her marriage, by reason of statutes which confer capacity upon married women either to contract generally or to convey their real estate or relinquish their claims to dower in the lands of their husbands: *Inhabitants of Taunton v. Inhabitants of Plymouth*, 15 Mass. 203, 204; *Davis v. Caldwell*, 12 Cush. 512, 513; *Waleh v. Young*, 110 Mass. 396; *Hartman v. Kendall*, 4 Ind. 403, 404; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Watson v. Billings*, 38 Ark. 278; 42 Am. Rep. 1; *Cummings v. Everett*, 82 Me. 260; *supra*, "Deeds of Infant Females Covert." The capacity of an infant to contract for necessities is, however, enlarged by his marriage; for he is bound for the reasonable value of necessities furnished his family as well as himself: *Chapman v. Hughes*, 61 Miss. 339; and see *infra*, "Necessaries." And an infant husband is liable at common law for his wife's debts contracted by her before marriage: *Roach v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 768; *Cole v. Seeley*, 25 Vt. 220; *Nicholson v. Wilborn*, 13 Ga. 467; *Anderson v. Smith*, 33 Md. 465; see *post*, "Liability of Infant Husband for Wife's Antenuptial Debts."

CONTRACTS ENTERED INTO PURSUANT TO STATUTE.—If a contract of a minor be entered into under the authority or direction of a statute, it is binding upon him, so far as the question of infancy is concerned, and cannot be disaffirmed. This is so expressly enacted in California and Dakota: Cal. Civ. Code, sec. 37; Dak. Comp. Laws 1887, sec. 2518; Civ. Code, sec. 19. Whether infants are contemplated, when not expressly mentioned, by statutes which provide for the execution of contracts under peculiar circumstances, is, of course, entirely a question of legislative intent. Where the statute is general in its terms, and such that it may apply to infants as well as adults, infants will be included, unless a contrary intent appears. "Where the words of law, in their common and ordinary signification, are sufficient to include infants," says Chief Justice Wilmot, "the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject-matter of it": *Earl of Buckinghamshire v. Drury*, Wilm. Op. 194. If, then, an infant is imprisoned on execution in a civil suit for an assault and battery, he is entitled to a discharge from imprisonment on assigning his property as provided for by a statute general in its terms, and the assignment is valid, notwithstanding his infancy: *People ex rel. Smith v. Mullin*, 25 Wend. 698. Again, a recognizance entered into by a minor for his personal appearance at court, to answer a charge of committing a criminal offense, is binding upon him under statutes authorizing recognizances to be taken, and defendants to be discharged thereon, and making no distinction between minor defendants who may commit crimes and be arrested and imprisoned, and other persons: *State v. Weatherwax*, 12 Kan. 463; and see *Dial v. Wood*, 9 Baxt. 296. And where, by statute, a person who is accused of being the father of a bastard child may be required to give bond to answer to a complaint made by the mother to a justice, and to abide the order of the court thereon, his infancy is no defense to an action on the bond, either for him or his sureties: *McCall v. Parker*, 13 Met. 372. Infancy, furthermore, is no defense to an action on a bond, executed pursuant to statute, by the reputed father of a bastard child, conditioned to indemnify the town against liability for the support of the bastard: *People v. Moores*, 4 Denio, 518; 47 Am. Dec.

272; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. So if a statute authorizes the infant father of a bastard child to settle with the mother, and secure to her compensation for keeping the child, it impliedly gives him the power to execute instruments necessary in making such settlement, and hence to a promissory note executed under such circumstances, infancy will be no defense: *Gavin v. Burton*, 8 Ind. 69; and a statute which imposes upon the father of a bastard child the obligation of supporting it, and provides a means of compelling him to do so, is applicable to infants, although it does not speak of them; and an infant accused by the mother of a bastard child of being its father may admit his liability and bind himself by a contract to support the child: *Stowers v. Hollis*, 83 Ky. 544.

ENLISTMENT. — The subject of an infant's contracts of enlistment in the military service is a branch of the one just considered. It has been said that, "by the general policy of the law of England, the parental authority continues until the child attains the age of twenty-one years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the state. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public that the parental authority should continue. The parental authority, however, is suspended, but not destroyed. When the reason for its suspension ceases, the parental authority returns": Best, J., in *Re v. Inhabitants of Rotherfield Greys*, 1 Barn. & C. 345, 349. In this country, there is no doubt, under the provision of the constitution of the United States giving Congress the power "to raise and support armies," and "to provide and maintain a navy," that Congress has the constitutional power to enlist minors into the army and navy of the United States; this it may do without the consent of the parents, guardians, or masters; for the right of a parent, guardian, or master to the service and control of the person of a minor child, ward, or apprentice is held in subordination to the sovereign right and power of the state to call upon its citizens to maintain and protect its existence. If the state recruits its army and navy by means of contracts of enlistment, such contracts may be made binding upon minors as well as adults: *United States v. Bainbridge*, 1 Mason, 71; *Commonwealth v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; *Commonwealth v. Barker*, 5 Binn. 423, 428, 429; *Commonwealth v. Downes*, 24 Pick. 227, 229; *United States v. Blakeney*, 3 Gratt. 405; *Phelan's Case*, 9 Abb. Pr. 286, 287; *In re Gregg*, 15 Wis. 479.

In *United States v. Bainbridge*, 1 Mason, 71, Story, J., says: "Whenever any disability, enacted by the common law, is removed by the enactment of a statute, the competency of the infant to do all acts within the purview of such statute is as complete as that of a person of full age. And whenever a statute has authorized a contract for the public service, which from its nature or objects is manifestly intended to be performed by infants, such a contract must, in point of law, be deemed to be for their benefit and for the public benefit, so that when *bona fide* made, it is neither void nor voidable, but is strictly obligatory upon them." It may be remarked that the learned justice attempts, in this passage, to uphold contracts of infants made valid and binding by statute on Lord Chief Justice Eyre's rule in *Keane v. Boycott*, 2 H. Black. 511, as to void, voidable, and binding contracts of infants at common law. There is no necessity for the effort; it is enough that the statute makes the contract binding. In *United States v. Blakeney*, 3 Gratt. 405, it is said by Baldwin, J.: "It seems to me to be obvious that the enlistment of a minor capable of bearing arms does not fall within the general rule of the municipal law in regard to the capacity of infants under

the age of twenty-one years to bind themselves by contract. Nor am I disposed to regard the enlistment as an exception to that rule. The rule, I think, has no application to the subject. The capacity of all citizens or subjects able to bear arms to bind themselves to do so by voluntary enlistment is in itself a high rule of the public law, to which the artificial and arbitrary rule of the municipal law forms no exception. The rule of the public law is subject to but two conditions: the ability of the party to carry arms, and his consent to do so; and these conditions may exist in as full force at the age of eighteen as at the age of twenty-one. The party is subject to no incapacity by any arbitrary rule in regard to discretion; and there is but little room for discretion when he is in the line of his allegiance and public duty." Again, it is said in *Lanahan v. Birge*, 30 Conn. 438, 443: "It is a fundamental principle of national law, essential to national life, that every citizen, whether of age to make contracts generally or not, is under obligation to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms, when of sufficient age and capacity to do so, and when such service is lawfully required of him. The power to enforce that obligation, so far as the necessities of the state may require, is an incident to state sovereignty, and the subject of state constitutional and statutory regulation. . . . Enlistment is but another and less objectionable method of securing the military service required by the state and due from the citizen; and the same essential principles of public policy and necessity which impose the obligation to serve, and confer the power to enforce that obligation, require that the minor who is subject to military draft should be at liberty to enlist when called upon in that form to render the military service which the state requires. It may indeed be for his interest to do so, rather than be subject to draft, as it certainly is sound policy in the government that he should. But however that may be, the obligation to serve, and the right to require the service, exist, and are paramount. What a minor can be compelled to do he may contract to do, or do voluntarily; and if he is lawfully subject to military duty, and is lawfully called upon to enlist, his contract of enlistment is as valid and binding as that of an adult. . . . Although it is the policy of the law to give to a parent a right to the service and control of the person of a minor child until he has attained the age which the law has fixed for his emancipation, yet that right and authority are holden in subordination to those paramount rights and powers of the state which are essential to the maintenance of civil society and civil government."

The chief question of difficulty is, whether Congress, under the statutes which have been passed from time to time, has authorized the enlistment of minors; or, more particularly, whether the enlistment of minors below certain ages is binding upon them, especially when made without the consent of the minor's parents, guardian, or master. This question has been discussed in a number of cases, but with some little conflict as to results, caused principally from a careless overlooking of some of the statutes: See *United States v. Bainbridge*, 1 Mason, 71; *United States v. Anderson*, Cooke, 143; *Brunner's Col. Cas.* 202; *Matter of Keeler*, Hemp. 306; *In re McDonald*, 1 Low. 100; *Commonwealth v. Murray*, 4 Binn. 487; 5 Am. Dec. 412; *Commonwealth v. Barker*, 5 Binn. 423; *Commonwealth v. Callan*, 6 Binn. 255; *Commonwealth v. Gamble*, 11 Serg. & R. 93; *Commonwealth v. Fox*, 7 Pa. St. 336; *United States v. Wright*, 5 Phila. 296, 297; *Commonwealth v. Cushing*, 11 Mass. 67; 6 Am. Dec. 156; *Commonwealth v. Downes*, 24 Pick. 227; *State v. Brearly*, 5 N. J. L. 555, 563; *Matter of Carlton*, 7 Cow. 471; *Phelan's Case*, 9 Abb. Fr. 296;

Matter of Dobbs, 21 How. Pr. 68; *State v. Dimick*, 12 N. H. 194; 37 Am. Dec. 197; *United States v. Blakeney*, 3 Gratt. 405; *United States v. Lipscomb*, 4 Gratt. 41; *In re Gregg*, 15 Wis. 479; *In re Higgins*, 16 Wis. 351; *In re Tarble*, 25 Wis. 390; and see, under state statutes, *Grace v. Wilber*, 10 Johns. 453, reversed in *Wilbur v. Grace*, 12 Johns. 68; *Lanahan v. Birge*, 30 Conn. 438; and under confederate laws, *Dies v. Hurtel*, 34 Ga. 109. It would serve no useful purpose to examine these cases, and the statutes upon which they are based, in detail. The reader will find a careful and exhaustive review of the question by Lowell, J., in the case of *In re McDonald*, 1 Low. 100; and by Brewer, J., in *In re Morrissey*, 137 U. S. 157.

ACT WHICH INFANT WOULD HAVE BEEN COMPELLED BY LAW TO DO. — The rule that if an infant does an act which the law would have compelled him to do, he will be bound thereby, has a connection with the subject of his contracts, and may therefore be here noticed and illustrated. The rule finds a somewhat frequent illustration in the case of his conveyances executed under such circumstances that the law would have compelled their execution, although it need not be confined in its application to such a case. The rule was thus announced by Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, 1801, as follows: "If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him; as if he makes equal partition; if he pays rent; if he admits a copyholder, upon a surrender. But there is no occasion to enumerate instances; the authorities are express, and the reason decisive. 'Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law';" citing Co. Litt. 172 a. In fact, the point really decided in *Zouch v. Parsons*, 3 Burr. 1794, 1801, was, that a deed of lease and release executed by the infant heir of a mortgagee, upon payment to him of the mortgage debt, was binding, and could not be avoided by him, for on payment of the debt the infant was compellable by law to execute the conveyance. "There can be but little doubt," says Story, J., in *Tucker v. Moreland*, 10 Pet. 59, 67, 1 Am. Lead. Cas. *224, *226, "that the decision in *Zouch v. Parsons*, was perfectly correct; for it was the case of an infant mortgagee, releasing by a lease and release his title to the premises, upon the payment of the mortgage money by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do, and could have been compelled to do by a court of equity, as a trustee of the mortgagor. And certainly it was for his interest to do what a court of equity would by a suit have compelled him to do." In *Irvine v. Irvine*, 9 Wall. 617, 626, there is a dictum, based on *Zouch v. Parsons*, to the effect that there were some cases in which the deed of an infant was not even voidable. "They are those in which the infant, by making the conveyance, does only what the law would have compelled him to do." And in *Bavington v. Clarke*, 2 Penr. & W. 115, 21 Am. Dec. 432, it was held, citing *Zouch v. Parsons*, that "where any person, even an infant, does that which by law he is compellable to do, that is, makes equal partition, he is bound."

The rule is well illustrated by the following cases. In *Elliot v. Horn*, 10 Ala. 348, 44 Am. Dec. 488, a father, upon purchasing land, took the title in the name of his infant son for the purpose of defrauding his creditors, and afterwards sold the land, the son executing the deed to the purchaser, at his father's direction, during his infancy. It was held that as the infant's conveyance of the naked legal title was only that which a court of equity would have compelled him to make, he could not disaffirm it on attaining majority. In *Starr v. Wright*, 20 Ohio St. 97, which was a similar case, a father made a voluntary conveyance of his land to his minor son, to defraud his creditors.

The son, during his infancy, reconveyed the land to his father, to sell for the purpose of paying the father's debts, charged on the land, and the father sold the land to a third person, who paid full value therefor, and out of the purchase-money paid the liens on the land. It was decided that as the son held the land in trust for the father and holders of the liens thereon, and as he might have been compelled by law to submit to a sale thereof for their benefit, and having voluntarily conveyed the land during his minority to discharge the trust, he could not, as against a *bona fide* purchaser, for that purpose, be permitted to disaffirm the conveyance after attaining his majority. So in *Bridges v. Bidwell*, 20 Neb. 185, where a father, on purchasing certain real estate, had the conveyance made to his son, and took a note secured by mortgage of the land from the son, and assigned the note and mortgage as collateral security for a debt, the son, it was held, could not plead his minority to defeat the mortgage in the hands of the assignees; the court saying: "Otto Bidwell, being a mere trustee of the legal title to the property in question, could convey the same in execution of the trust, and having done so, neither he nor his father can plead his infancy to invalidate the deed." In *Trader v. Jarvis*, 23 W. Va. 100, also, a father made an assignment of a title bond to his sons to indemnify them against any loss they might sustain by reason of their being sureties on the father's note. Afterwards the father and sons assigned the title bond to a third person, who agreed to pay, and did pay, the note, thereby releasing the sons from liability thereon as sureties. It was held that the conditions upon which the bond had been assigned to the sons having been upon performed, they had no further interest in it, and one of the sons could not avoid his assignment to the third person on the ground of his minority.

Again, in *Prouty v. Edgar*, 6 Iowa, 353, it was decided that where a son held the legal title to real estate in trust for his father, who executed a bond for the conveyance of the same, and received the purchase-money, the son, who conveyed the land in accordance with the requirements of the bond, could not set aside the deed on the ground that he was a minor when it was executed. "Holding the title, as he did, for the benefit of his father, who had sold the land to the defendant, and received the purchase-money, we do not see how, even if his infancy was conclusively established, he could have resisted the claim of defendant for the conveyance of the legal title. He would have been required in equity to convey." So where an infant purchases land at an administrator's sale for the administrator, and immediately conveys to him, he cannot disaffirm such conveyance on arriving at full age as though the lands belonged to him: *Sheldon's Lessee v. Newton*, 3 Ohio St. 494.

In *Watson v. Cross*, 2 Duvall, 147, 148, the court expressed the opinion that an innkeeper could recover for entertainment furnished an infant, on the theory that he was legally bound to receive and entertain all guests apparently responsible and of good conduct who might come to his house, and the contract was therefore compulsory on his part, and hence the law would not permit it to be avoided on the other side for infancy. This reasoning is simply absurd. An innkeeper may demand his reasonable compensation in advance. If he suspects a person who applies to him for entertainment to be an infant, he should exercise this privilege; and if he fails to do so from the fact that he believed the proffered guest to be an adult, or from any other cause, and the plea of infancy is set up as a defense to his charges, he is in no worse a position than any one else who happens to trust an infant, and there is no more reason why he should be protected.

LIABILITY OF INFANT HUSBAND FOR WIFE'S ANTENUPTIAL DEBTS. — An infant husband is liable at common law for such debts of his wife contracted before marriage as she would have been legally liable to pay had she remained sole. Therefore the infant husband is liable for all the antenuptial debts of the wife if she were adult when she contracted them, and for her debts for necessities if she were an infant. The liability of the husband is, of course, not due to any idea of contract on his part, but is a common-law incident to the marriage; and the fact that the husband is an infant furnishes no excuse: *Ronch v. Quick*, 9 Wend. 238; *Butler v. Breck*, 7 Met. 164; 39 Am. Dec. 768; *Cole v. Seeley*, 25 Vt. 220; *Nicholson v. Wilborn*, 13 Ga. 467; *Anderson v. Smith*, 33 Md. 465. This rule, it will be observed, has a connection with the one just considered.

NECESSARIES — THE GENERAL RULE. — It has already been seen that an infant is liable for the reasonable value of necessities which may have been furnished him. To the general rule that an infant is incapable of binding himself by his contracts, this constitutes an exception. The exception is not introduced for the benefit of those who may deal with the infant, but for the benefit of the infant himself. It is to protect the infant that the law enables him to avoid his general contracts; and for the same reason the law compels him to answer for the reasonable value of necessities. Were the rule otherwise, the infant might not be able to procure suitable food, clothing, shelter, and education, though certain to possess means for payment in the future: See *Ryder v. Wombwell*, L. R. 4 Ex. 32, 38, per Willes, J. Lord Coke thus expresses the rule: "An infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himselfe afterwards": Co. Lit. 172 a. The obligation to pay for necessities is a legal one, for which the law gives an adequate remedy, and therefore a resort cannot be had to equity: *Oliver v. McDuffie*, 28 Ga. 522.

The rule is expressly preserved in some states by statute. Thus in California and Dakota, it is provided that "a minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them": Cal. Civ. Code, sec. 36; Dak. Comp. Laws 1887, sec. 2517; Civ. Code, sec. 18; and in Georgia it is enacted that "the contracts of an infant under twenty-one years of age are void [voidable], except for necessities; and for necessities they are not valid, unless the party furnishing them proves that the parent or guardian fails or refuses to supply sufficient necessities for the infant."

EXPRESS CONTRACTS FOR NECESSARIES. — Whether an infant is ever bound by his express contract with reference to the price or value of necessities furnished him has been disputed. It is agreed, however, that he cannot be held for more than their reasonable value. Or, as said in *Locke v. Smith*, 41 N. H. 346, an infant may bind himself to pay for necessities he obtains, so much as they are reasonably worth, but not what he may foolishly have agreed to pay for them; and in *Trainer v. Trumbull*, 141 Mass. 527, 530, it was observed that the question whether or not an infant made an express promise to pay for necessities was not important. "He is held on a promise implied by law, and not, strictly speaking, on his actual promise. The law implies the promise to pay from the necessity of his situation, just as in the case of a lunatic. In other words, he is liable to pay only what the necessities were reasonably worth, and not what he may improvidently have agreed to pay for them."

It has been held that no action could be maintained against an infant on his express contract for necessities, and even that his express contract was void; yet we doubt that an action would be dismissed by any court at the present day because brought upon the express contract, if the contract were of such a form that its consideration could be inquired into, so that it might be ascertained whether the amount agreed to be paid was what the necessities were reasonably worth. If the agreed amount exceeded the reasonable value of the necessities, we do not see why the action upon the express contract should not still be maintained, and a recovery had for the difference; and if the amount stipulated to be paid was no more than the necessities were justly worth, we do not see why the express contract should not be said to be binding upon him to the fullest extent. We think these views are sustained by the weight of authority. For instance, it has been seen, *supra*, under the title "Service," that if services are rendered by an infant, pursuant to an agreement, in consideration of board, clothing, education, and other necessities, and the agreement is fairly made and fully executed on both sides, the infant cannot avoid the agreement and recover the value of the services on a *quantum meruit* merely because the services eventually proved to be worth somewhat more than the necessities furnished. In other words, such an executed agreement for necessities is completely binding, so far as it is executed: *Stone v. Dennison*, 13 Pick. 1; 23 Am. Dec. 654; *Wilhelm v. Hardman*, 13 Md. 140; *Squier v. Hydliff*, 9 Mich. 274; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662; and see *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152; *Breed v. Judd*, 1 Gray, 455, 458; but see *Wheatly v. Miscal*, 5 Ind. 142; and compare *Locks v. Smith*, 41 N. H. 348; *Mountain v. Fisher*, 22 Wis. 93. We do not see why this rule cannot be generalized; and we should accordingly say that an infant's contract for necessities, when fairly made and fully executed on both sides, by the furnishing of the necessities on the one side and the payment on the other, is binding; and that he cannot disaffirm the contract on afterwards discovering that he has paid more for the necessities than what they might have been obtained for, and recover back at least such excess.

Again, it has also been seen, *supra*, title "Bills and Notes," that a plea of infancy has sometimes been sustained to an action on a bill of exchange accepted or a promissory note made for necessities, and that the expression has sometimes been used that an infant's negotiable paper was always void, for the reason that the infant would be precluded from questioning the consideration if the paper came into the hands of a *bona fide* holder for value without notice, and before maturity: *Williamson v. Watts*, 1 Camp. 552; *Swasey v. Vanderheyden's Adm'r*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *McMinn v. Richmonds*, 6 Yerg. 9; *Fenton v. White*, 4 N. J. L. 100; *McCrillis v. How*, 3 N. H. 348; *Morton v. Steward*, 5 Ill. App. 533; yet even under this view the payee of the note might recover on a count for necessities: *McCrillis v. How*, 3 N. H. 348; and if the infant went into a court of equity to have the note canceled, he would be required to do equity by paying the reasonable value of the necessities: *McMinn v. Richmonds*, 6 Yerg. 9. These cases, founded, as they are, upon the mistaken notion that infancy is not a defense to an action on negotiable paper by a *bona fide* holder, are obviously entitled to very little respect. Furthermore, even conceding the basis of their ruling to be correct, it would furnish no reason why the payee of the paper given for necessities should not be entitled to maintain an action upon it, unless the most extreme view of Lord Chief Justice Eyre's rule be taken, that the paper should be declared absolutely void because the infant might

possibly be prejudiced by the paper coming into the hands of a *bona fide* holder: See *Morton v. Steward*, 5 Ill. App. 533; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26. Again, attention should be called to the fact that the cases simply involved the right of the infant to set up his disability in an action against him, and that it was really unnecessary for the court to assert that the paper was void. It might be held that infancy would be a good defense; but we do not understand the cases as going to the length of holding that the paper could not be ratified by the infant after reaching majority.

We consider it by all means the sounder and better doctrine that an action can be maintained against an infant upon his negotiable paper given for necessities, either by the original payee or by any subsequent holder, and that the plaintiff may recover the full face of the paper, or so much thereof as represents the reasonable value of the necessities; for infancy can be shown, and the consideration, therefore, of the paper be inquired into, no matter who may be plaintiff: *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Met. 387; *Dubose v. Wheddon*, 4 McCord, 221; *Aaron v. Harley*, 6 Rich. L. 26; *Askey v. Williams*, 74 Tex. 294; and see *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637. In *Bradley v. Pratt*, 23 Vt. 378, Redfield, J., said: "I do not well comprehend why, upon principle, any express contract may not be said to be binding upon him, when it is shown to have been given for necessities, and the price to have been reasonable, if it be one where the consideration may be inquired into. . . . And as confessedly the infant may *prima facie* avoid his note or bill by merely showing the fact of his infancy at the time of making the contract, what is the impropriety in allowing the plaintiff to recover in all such cases by showing the consideration to be for necessities?" And in *Askey v. Williams*, 74 Tex. 294, it was well remarked: "We apprehend the better doctrine to be that an infant may make an express written contract for necessities upon which he may be sued, but that by showing the price agreed to be paid was unreasonable, he can reduce the recovery to a just compensation for the necessities received by him. It is to his benefit to hold the express contract not void, but voidable; for if it be voidable merely, he can secure the advantage of a good bargain, and may relieve himself of it if it be a bad one, while, on the other hand, to hold it void would deprive him of the benefit of an advantageous contract."

The much-discussed case of *Russel v. Lee*, 1 Lev. 86, over which judges and writers have become considerably exercised in their attempts to reconcile it with other decisions, to the effect that an infant's single bill for necessities was good, we think is capable of an easy and satisfactory explanation on the foregoing grounds, it being possible to inquire into the consideration of the instrument. Compare *Beeler v. Young*, 1 Bibb, 519.

If the form of the instrument given for necessities be such as to preclude an inquiry into the consideration, it could very well be held that no action could be maintained thereon against the defense of infancy. Therefore it would seem that no action could be maintained at common law against an infant on a bond or other sealed instrument executed by him for necessities. And in case of a bond there would be a further objection on account of the penalty: See *Ayliff v. Archdale*, Cro. Eliz. 920; *Buss v. Perryman*, 1 Scam. 484; *Hussey v. Jewett*, 9 Mass. 100, 101. These cases, however, are not very satisfactory. In *Ayliff v. Archdale*, Cro. Eliz. 920, it was held that an obligation in double the sum for money paid by the plaintiff for the necessary meat and drink of the defendant was void, but it was said that had the plaintiff taken an obligation for the very sum which he had laid out, it would have

been otherwise. The case is open to criticism in saying that the bond with the penalty was void, for that would mean that it could not be ratified; and we do not think that the court, as we understand its meaning, is correct in its *dictum* that an obligation under seal for even the very sum expended for necessities could be sustained against a plea of infancy. In *Bliss v. Perryman*, 1 Scam. 484, the court expressed itself to the effect that all bonds of infants, even for necessities, were void, and incapable of ratification so that actions could be maintained upon them; and see *Hussey v. Jewett*, 9 Mass. 100, 101. We think that *Guthrie v. Morris*, 22 Ark. 411, gives the true rule in holding that where, by statute, the consideration of a bond may be inquired into, an action may be maintained on a bond given by an infant for necessities. See quotations from this case *ante*, title "Bonds."

It is for the reason last given that the cases which hold that an infant is not liable on an account stated for necessities can be sustained, although the cases themselves give no reason. The item, or in other words, the consideration of an account stated, cannot be inquired into: *Wood v. Witherick*, Latch, 169; *Pickering v. Gunning*, Palmer, 528; *W. Jones*, 182; *Ingledeu v. Douglas*, 2 Stark. 36; *Trueman v. Hurst*, 1 Term Rep. 40; *Bartlett v. Emery*, 1 Term Rep. 42, note; *Oliver v. Woodroffe*, 4 Mees. & W. 650; and see *Williams v. Moor*, 11 Mees. & W. 256, 265, per Baron Parke; and *supra*, title "Accounts Stated."

So far as the question of an infant's liability on his agreement to pay interest contained in his express contract for necessities is concerned, it was held in *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228, that interest would not be allowed; but this case was overruled, and we think correctly so, in *Bradley v. Pratt*, 23 Vt. 378. See the quotation from the opinion of Redfield, J., in this latter case, *supra*, title "Interest."

The deed of an infant to secure an indebtedness for necessities was held to be voidable in *Martin v. Gale*, L. R. 4 Ch. Div. 428, and to be valid and binding, to the extent of the value of the necessities, in *Cooper v. State*, 37 Ark. 421. In our opinion, the first of these rulings is correct. The note, or other instrument of indebtedness, may be valid, but we cannot see why the security should be equally binding. In *Askey v. Williams*, 74 Tex. 294, it was held that a power of sale given to the mortgagee, in a mortgage executed by an infant to secure the price of necessities, was not void, but voidable only, and a conveyance thereunder was ratified by the failure of the infant to tender the reasonable value of the necessities within a reasonable time after reaching majority.

Finally, it should be carefully remembered that an infant is liable for necessities only when they have been actually furnished to him. He is not liable for breach of his contract to take and pay for them. Thus, says Chipman, C. J., in *Pool v. Pratt*, 1 Chip. 252, 254: "An infant is bound by his contract for necessities, but it must be a contract executed by an actual delivery and receipt of the necessities to his use; and if he contract to purchase articles ever so necessary, he is not holden by his contract to receive and pay for the articles."

IMPLIED CONTRACTS FOR NECESSARIES. — An infant need not have expressly promised to pay for necessities, in order to render him liable therefor. It is sufficient if they be furnished him under such circumstances that a promise to pay for them can be implied: *Duncomb v. Tickridge*, Aleyn, 94; *Gay v. Ballou*, 4 Wend. 403; 21 Am. Dec. 158; *Hyman v. Cain*, 3 Jones, 111. Indeed, it has been seen under the last head that there is a theory that even if he makes an express contract, he cannot be held liable thereon, but only on a

promise implied by the law to pay what the necessities are reasonably worth. The necessities must be furnished under such circumstances that the law will imply a promise to pay for them on the part of the infant. Hence if the infant lives with a stranger as a member of his family, rendering such services as might be expected of him, and receiving in return a home, clothing, and care, such as a child of the stranger would receive, it seems evident to us that the law will allow him nothing for his services over and above what he has received. But see *Garner's Adm'r v. Board*, 27 Ind. 323; *Meredith v. Crawford*, 34 Ind. 399; compare *Mountain v. Fisher*, 22 Wis. 93; and see *ante*, title "Service," where this question is considered more at length. For this reason, there is no implied obligation on the part of an infant to pay for his support, as necessities, furnished by his step-father, with whom he lived as one of the family: *Hussey v. Roundtree*, Busb. L. 110.

NECESSARIES MUST HAVE BEEN PROCURED AT INSTANCE OF INFANT, AND CREDIT GIVEN TO HIM. — As said in the old case of *Duncomb v. Tickridge*, Aleyn, 94: "If an infant comes to a stranger and boards with him, there is a contract, in law, implied that he should pay for his board as much as is a worth; but if another undertakes to pay for his boarding, this express agreement takes away the implied contract," and there can be no recovery against the infant. It is plain that an infant is not liable for necessities supplied solely on the credit of her guardian, and charged to him, although the credit given to the guardian was induced by the fact that the ward had an estate of her own from which the payment was expected to come: *Simms v. Norris*, 5 Ala. 42. And a guardian, as such, has no right to enter into contracts for necessities which shall bind the infant ward: *Phelps v. Worcester*, 11 N. H. 51; *Wallis v. Bardwell*, 126 Mass. 366.

CIRCUMSTANCE OF INFANT'S BEING ALREADY SUPPLIED WITH NECESSARIES — PRESUMPTION. — If an infant is already properly supplied with necessities, whether by his parents, guardian, friends, tradesmen, or, in short, from any source whatever, it is well settled that his contracts for additional articles, or in reference to other matters which would otherwise be necessities, are not binding upon him as contracts for necessities: *Bainbridge v. Pickering*, 2 W. Black. 1325; *Ford v. Fothergill*, Peake N. P., 229; 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Story v. Pery*, 4 Car. & P. 526; *Burghart v. Angerstein*, 6 Car. & P. 690; *Mortara v. Hull*, 6 Sim. 465, 466; *Brayshaw v. Eaton*, 7 Scott, 183; 5 Bing. N. C. 231; *Steedman v. Rose*, Car. & M. 422; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; *Wailing v. Toll*, 9 Johns. 141; *Kline v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652; *Angel v. McLellan*, 16 Mass. 28, 31; 8 Am. Dec. 118, 120; *Swift v. Bennett*, 10 Cush. 436, 437; *Davis Caldwell*, 12 Cush. 512, 513; *Hoyt v. Casey*, 114 Mass. 397; 19 Am. Rep. 371; *Trainer v. Trumbull*, 141 Mass. 527, 530; *Assignees of Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Edwards v. Higgins*, 2 McCord Ch. 16; *Kraker v. Byrum*, 13 Rich. L. 163; *Guthrie v. Murphy*, 4 Watts, 80; 28 Am. Dec. 631; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Smith v. Young*, 2 Dev. & B. 26; *Hussey v. Roundtree*, Busb. L. 110; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Elrod v. Myers*, 2 Head, 33; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; *McKanna v. Merry*, 61 Ill. 177, 180; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449. An oversupply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against the infant only for so much as was actually needed: *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542. But a minor, it is held, although he have an income suffi-

cient to provide him with necessaries suitable to his condition, may, nevertheless, contract for necessaries on credit: *Burghart v. Hall*, 4 Mees. & W. 727; but see *Rivers v. Gregg*, 5 Rich. Eq. 274; *Nicholson v. Wilborn*, 13 Ga. 467.

A tradesman, therefore, who trusts an infant does so at his peril, and cannot recover for the price of articles furnished the infant on credit, as necessaries, if he was already sufficiently supplied: *Story v. Pery*, 4 Car. & P. 526; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Perrin v. Wilson*, 10 Mo. 451; *Nicholson v. Spencer*, 11 Ga. 607. It is consequently incumbent upon the tradesman, before he gives credit to the infant, to make inquiries as to whether the infant was not at the time suitably provided with the articles: *Ford v. Fothergill*, Peake N. P. 229; 1 Esp. 211; *Cook v. Deaton*, 3 Car. & P. 114; *Burghart v. Angerstein*, 6 Car. & P. 690; *Mortara v. Hall*, 6 Sim. 465, 466; *Steedman v. Rose*, Car. & M. 422; *Klins v. L'Amoureux*, 2 Paige, 419; 22 Am. Dec. 652; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542. "But," says Tindal, C. J., in *Dalton v. Gib*, 7 Scott, 117, also reported in 5 Bing. N. C. 198, "a party may, by his conduct and appearance, render inquiry unnecessary"; and hence where an infant lived with her mother at a fashionable hotel, and drove to the tradesman's shop in a carriage with her mother, who waited in the carriage while the daughter purchased the goods, some of which were taken away in the carriage, and others sent to the hotel, it was held that the jury might fairly assume that the goods were subjected to the mother's inspection, and that there was no necessity of making inquiry as to whether they were necessary or not; and where the friends of a minor, who was an orphan, had twice previously taken him to a dentist for like services, and the bills had been made out against the minor, and paid, the guardian furnishing the money, without notice, to the dentist, of any objection, it was held that "these acts on the part of the defendant and his guardian rendered it unnecessary that the plaintiff should have instituted an inquiry as to a guardianship over the defendant, before performing these last services, as a prerequisite for a recovery in this suit, the work being necessary to meet an unsupplied want": *Strong v. Foote*, 42 Conn. 203. Compare, however, the cases in the next paragraph.

But the duty of the tradesman to inquire as to whether or not the infant is already supplied with similar articles before he trusts him is not a rule of law which will protect the tradesman, if, notwithstanding a diligent inquiry without ascertaining that the infant has been supplied, it turns out after he furnishes the articles applied for that the infant was sufficiently provided. If the infant was already supplied as a fact, the tradesman cannot recover for other goods supplied as necessaries, whether the latter knew of the fact or not, at the time he gave credit to the infant: *Brayshaw v. Eaton*, 7 Scott, 183; 5 Bing. N. C. 231; *Foster v. Redgrave*, L. R. 4 Ex. 35, note; *Barnes v. Toye*, L. R. 13 Q. B. D. 410; *Trainer v. Trumbull*, 141 Mass. 527, 530; *Nichol v. Steger*, 2 Tenn. Ch. 328, affirmed in 6 Lea, 393; and see *Ryder v. Wombwell*, L. R. 4 Ex. 32. There is no inflexible rule of law, according to the case of *Brayshaw v. Eaton*, 7 Scott, 183, 5 Bing. N. C. 231, making it incumbent on a tradesman to institute inquiries as to the situation and resources of an infant before he gives him credit for necessaries. "No doubt," says Tindal, C. J., in the report of the case in 7 Scott, "a prudent tradesman would make such inquiry; and the total absence of inquiry would afford matter of strong observation to the jury. But whether inquiry were made or not, the question for the jury would still be the same; and their verdict must depend, not upon the degree of knowledge acquired by the tradesman as to the infant's circumstances, but upon whether the goods were necessaries or not." "In

my view," says Lopes, J., in *Barnes v. Toye*, L. R. 13 Q. B. D. 410, "it is immaterial whether the plaintiffs did or did not know of the existing supply, just as it is immaterial whether they did or did not know that the defendant was a minor."

It is sometimes stated as the reason for the rule that an infant is not liable as for necessities, when he is already sufficiently supplied, applicable to the condition of circumstances, where he resides with and is supported by his parents, or is under the care of a guardian, that it is a matter for the parents or guardian to decide what shall be suitable and proper for the maintenance of the child or ward, and third persons have no right to interfere with the exercise of that discretion. Thus in *Bainbridge v. Pickering*, 2 W. Black. 1325, it is said that "no man shall take upon him to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father or mother." And in *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371, this notion was carried to the extent of holding that a case could not be excepted from the operation of the principle because the father was a poor man, and unable to pay for the necessities, — in this case medical attendance, — there being no refusal or neglect on his part to perform the duty of supporting and caring for his son. It may be very true that when a child is under the care and control of his parents or guardian, they have the right to determine the character of his support; but we do not think that this affords a reason for the rule under consideration even under that state of facts, and certainly it is no reason when the infant either has no parents or guardian, or is not under their control. We think the liability of the parent for necessities furnished his child under certain circumstances has been confused by these cases with the liability of the child himself. We think that the reason of the rule is simply that when the infant is amply supplied with necessities, nothing else is necessary, and hence he cannot be further bound as for necessities.

We should say it is certainly true that the mere fact that an infant had a father, mother, and guardian, neither of whom did anything towards his care or support, does not prevent his being bound to pay for that which was actually necessary for him when furnished: *Trainer v. Trumbull*, 141 Mass. 527; and hence a person who takes from an almshouse a minor whose father was an inmate of a soldier's home, and whose mother was committed to a reformatory institution, who has a guardian, and who will inherit property on the death of his father, may maintain an action against the minor, after his father's death, for support and education furnished to him on the credit of his expectations of property: *Trainer v. Trumbull*, 141 Mass. 527. Furthermore, it is held that the mere fact that an infant lived with her mother did not necessarily render her incapable of binding herself for necessities: *Atchison v. Bruff*, 50 Barb. 381.

But when it appears that an infant lives with his father, or even his mother, who may not be under the same obligation to support him as the father, or is under the care of a guardian, it is a very natural and reasonable presumption that he is properly supplied with necessities, and he is therefore not liable for anything further, in the absence of evidence to the contrary: *Assignees of Hull v. Connolly*, 3 McCord, 6; 15 Am. Dec. 612; *Jones v. Colvin*, 1 McMull. L. 14; *Perrin v. Wilson*, 10 Mo. 451; *State v. Cook*, 12 Ired. L. 67; *Freeman v. Bridger*, 4 Jones L. 1; 67 Am. Dec. 258; compare *Parsons v. Keys*, 43 Tex. 557. And if it appears that a parent or guardian has furnished the infant with such articles as he regarded ample for the support of the infant, according to his age and condition, or even that the

infant has been furnished with money by his parent or guardian, or by an allowance from the court, sufficient to supply him with necessities, the presumption is, that he has been adequately and properly supplied, and a tradesman who seeks to charge the infant as for necessities in addition has the burden of proving that such is not the fact: *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467; *Rivers v. Gregg*, 5 Rich. Eq. 274. In *Rivers v. Gregg*, Dargan, C., says: "When it is shown that an infant is supplied with necessities by his parent or guardian, or with funds amply sufficient to procure them, the presumption of law and reason must be that he does not stand in need of credit to obtain what is necessary for him. And after this *prima facie* showing, he who alleges that, notwithstanding this, the infant was in a state of destitution, must take upon himself the burden of proving the allegation. If he does this in a satisfactory manner, his claim should be allowed. But even then it should be limited to bare necessities, and should not be allowed to embrace articles of luxury which would otherwise be suitable to the infant's fortune and condition in life." Again, he says: "It is a fallacy to suppose that a distinction can be drawn between the case where an infant is actually supplied with the necessities themselves, and that where he receives an allowance under an order of the court, which he is to disburse himself in their purchase. If it be urged that the infant may waste or misapply his allowance, and thus be reduced to a state of destitution that would require his necessary wants to be otherwise supplied, it is obvious that the argument applies with equal force to the case where the infant is supplied with the necessary articles for his use and consumption. These he may sell, give away, or waste, so that it may become necessary that he should have more, to save him from nakedness and starvation." If these special circumstances do not appear, however, and the infant relies as a defense to an action for necessities on the fact that he was at the time properly supplied with necessities, it would seem that the burden of proving the fact rests upon him: See *Johnstone v. Marks*, L. R. 19 Q. B. D. 509; also *Parsons v. Keys*, 43 Tex. 557, in which case, however, it appeared that the defendant had a guardian.

It has been determined that a stranger cannot recover the price of goods sold to an infant, as for necessities, against the injunctions of his guardian: *Bredin v. Deven*, 2 Watts, 95; but, in our opinion, this ruling is altogether too broad. No doubt, if the guardian forbade the furnishing of the articles to the infant, this would be a circumstance to show that the infant was already properly supplied with necessities; but we think the infant's liability depends, after all, upon the question whether he *was* so supplied. And in other cases it has been held that an infant may bind himself for necessities purchased with the consent of his guardian: *Rundel v. Keeler*, 7 Watts, 237; *Watson v. Hensel*, 7 Watts, 344; but it was more correctly held in *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542, that the permission of a guardian to tradesmen to deal with his infant ward might, in a doubtful case, justify a *bona fide* supply to the infant beyond the limits of strict necessity, for which the infant would be liable; but the connivance of the guardian at an improper supply would not subject the ward to pay for it. Again, we should say that the infant's liability depends, except in a doubtful case, not on the fact that the guardian assented to the furnishing of the articles, but upon the question whether the infant was really properly supplied at the time.

TEST AS TO WHAT ARE NECESSARIES — STATION AND CIRCUMSTANCES OF INFANT — ARTICLES FOR MERE ORNAMENT OR PLEASURE. — It is obvious

that the question what are necessaries depends upon the infant's station and condition in life. The term is entirely a relative one. What would be necessaries in one case might not be in another: *Ford v. Fothergill*, v. 1 Esp. 211; *Peake N. P.* 229; *Hands v. Slaney*, 8 Term Rep. 578; *Burghart Angerstein*, 6 Car. & P. 690; *Mortura v. Hall*, 6 Sim. 465, 467; *Lowe v. Griffiths*, 1 Scott, 458, 460; 1 Hodges, 30, 31; *Brayshaw v. Eaton*, 7 Scott, 183, 187; 5 Bing. N. O. 231, 234; *Steedman v. Rose*, Car. & M. 422; *Smithpeters v. Griffin's Adm'r*, 10 B. Mon. 259, 260; *Breed v. Judd*, 1 Gray, 455, 458; *Price v. Sanders*, 60 Ind. 310, 314. "What are necessaries," says Campbell, J., in *Epperson v. Nugent*, 57 Miss. 45, 47, 34 Am. Rep. 434, "cannot be determined by any arbitrary and inflexible rule. It depends on circumstances, and each case must be governed by its own." And, says Dargan, Chancellor, in *Rivers v. Gregg*, 5 Rich. Eq. 274, 278, "necessaries, when the term is applied to an infant, are those things that are conducive and fairly proper for his comfortable support and education, according to his fortune and rank. So that what would be considered necessary in one case would not be so regarded in another. The rule is entirely relative in its operation."

It is not to be understood that the term "necessaries" is to be confined to those things required merely to sustain life; but it includes what may be suitable and proper for the particular person according to his station and circumstances: *Peters v. Fleming*, 6 Meca. & W. 42; *Davis v. Caldwell*, 12 Cush. 512, 513; *Nicholson v. Spencer*, 11 Ga. 607, 610; *Jordan v. Cofield*, 70 N. O. 110; *Strong v. Foote*, 42 Conn. 203. Articles of mere luxury or of pure ornament would be excluded, unless, perhaps, in very extraordinary cases; but "luxurious articles of utility" might be included. Thus in *Peters v. Fleming*, 6 Meca. & W. 42, Baron Parke said: "It is perfectly clear that from the earliest time down to the present the word 'necessaries' was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense, but with the qualification above pointed out." Again, he says: "The true rule I take to be this: that all such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were for such articles, the infant may be responsible." Baron Alderson, who also gave his views to the same effect, again remarked, several years afterward: "Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed": *Chapple v. Cooper*, 13 Meca. & W. 252. Perhaps the same thing was intended when it was said in *Wharton v. Mackenzie*, 5 Q. B. 606, that articles of comfort and convenience merely, in a particular case, can never be included under the term "necessaries." See also *McKanna v. Merry*, 61 Ill. 177, 179. But in *Ryder v. Wombwell*, L. R. 4 Ex. 32, 41, Willes, J., observes: "Possibly there may be exceptional cases in which things purely ornamental may be necessary. In such a state of things as we believe existed at the close of the last century, it might have been a question for a jury whether it was not necessary, for the purpose of maintaining his station, for a young gentleman moving in society to purchase wigs and hair-powder; but, as a general rule, and in the absence of some

evidence to show that the usages of society required the use of such things, we think the rule laid down in *Peters v. Fleming*, 6 Mees. & W. 42, is correct."

On the other hand, the mere fact that articles furnished or services rendered were beneficial or desirable to the infant does not make him liable therefor as necessities: *Tupper v. Cadwell*, 12 Met. 559, 563; 46 Am. Dec. 704; 705; *Phelps v. Worcester*, 11 N. H. 51; *Middlebury College v. Chandler*, 16 Vt. 683, 686; 42 Am. Dec. 537, 538; *Turner v. Gaither*, 83 N. C. 357, 362; 35 Am. Rep. 574, 576; and see other cases cited as to materials or money supplied and services performed for the benefit of his estate, *post*, title "Illustrations of What may be Necessaries." And we may here observe, also, that it is laid down as a general principle that necessities concern the person and not the estate of the infant: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Decell v. Leventhal*, 57 Miss. 331; 34 Am. Rep. 449; but see *Epperson v. Nugent*, 57 Miss. 45; 34 Am. Rep. 434.

QUESTION OF NECESSARIES, WHETHER OF FACT OR LAW. — The province of the court and of the jury in solving the question of necessities involves a proposition of considerable nicety, and one which is not always as clearly and definitely stated as it might be. The rule, having regard particularly to the latest cases, seems to be this: It is for the court to determine, as a matter of law, in the first place, whether the things supplied may fall within the general classes of necessities, and if so, whether there is sufficient evidence to warrant the jury in finding that they were necessary. If either of these preliminary inquiries be decided in the negative, it is the duty of the court to nonsuit the plaintiff who seeks to recover from the infant. If they be decided in the affirmative, it is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the infant, as well as their reasonable value, and whether the infant was already sufficiently supplied: *Rainsford v. Fenwick*, Cart. 216; *Harrison v. Fane*, 1 Scott N. R. 287, 289; 1 Man. & G. 550, 553; *Peters v. Fleming*, 6 Mees. & W. 42; *Brooker v. Scott*, 11 Mees. & W. 67; *Wharton v. Mackenzie*, 5 Q. B. 606; *Bryant v. Richardson*, L. R. 3 Ex. 93, note; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479; *Hult v. Arbon*, 34 L. T. 125; *Beeler v. Young*, 1 Bibb, 519; *Saunders v. Ott*, 1 McCord, 572; *Smith v. Young*, 2 Dev. & B. 26; *Tupper v. Cadwell*, 12 Met. 559, 563; 46 Am. Dec. 704, 705; *Merriam v. Cunningham*, 11 Cush. 40; *Davis v. Caldwell*, 12 Cush. 512, 513; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Jordan v. Coffield*, 70 N. C. 110, 113; *Henderson v. Fox*, 5 Ind. 489, 491; *Garr v. Haskett*, 86 Ind. 373; *McKanna v. Merry*, 61 Ill. 177; *Decell v. Leventhal*, 57 Miss. 331; 34 Am. Rep. 449; compare the following cases: *Maddox v. Miller*, 1 Maule & S. 738; *Brayshaw v. Eaton*, 7 Scott, 183, 188; 5 Bing. N. C. 231, 235; *Hart v. Prater*, 1 Jur. 623; *Jenner v. Walker*, 19 L. T. 398; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Mohney v. Evans*, 51 Pa. St. 80; *Swift v. Bennett*, 10 Cush. 436, 437.

BURDEN OF PROOF AS TO NECESSARIES. — It has been seen, *supra*, title "Circumstance of Infant's being Already Supplied with Necessaries," that where it appears that an infant lives with his parents, or is under the care of a guardian, a presumption exists that he is properly supplied with necessities. Therefore one who seeks to charge the infant further for articles otherwise conceded to be necessities has the burden of showing that he was not so supplied. But it seems that if the infant does not live with his parents, nor is under the care of a guardian, but defends on the ground that he was already sufficiently provided, the burden is upon him to show the fact.

Aside from these cases, one claiming to recover from an infant on the ground of necessities is obliged to plead and prove the fact that having regard to the condition and circumstances of the infant, the things supplied the infant were such: *lee v. Chester*, Cro. Jac. 560; *Mortara v. Hall*, 6 Sim. 465, 467; *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542; *Thrall v. Wright*, 38 Vt. 494; *Wood v. Losey*, 50 Mich. 475; and where the defendant pleaded infancy to an action on a promissory note, it was held that a reply that the note was given for necessities furnished the defendant at her request, without specifying in what the necessities consisted, was demurrable on account of its vagueness: *Burr v. Wilson*, 18 Tex. 367.

ILLUSTRATIONS OF WHAT MAY BE NECESSARIES. — According to the language of Lord Coke, heretofore quoted, "An infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicks, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards": Co. Lit. 172 a. Subject to the foregoing general rules, there, of course, can be no doubt that food is included in the term "necessaries" for which an infant may bind himself: See *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314; *Barnes v. Barnes*, 50 Conn. 572. Entertainment furnished by an innkeeper may be classed under the head of necessities, for which an infant is liable, and for which, it is held, the innkeeper has a lien on the infant's property brought within the inn: *Watson v. Cross*, 2 Duvall, 147. We think it doubtful that the innkeeper can claim a lien for the necessary entertainment. Besides, this case seems to us to be altogether incorrectly decided on the facts, which showed that the infant was placed by his guardian at school, but left there and came to the inn.

Suitable clothing may likewise undoubtedly be a necessary for which an infant may be held liable: See *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314. Regimentals furnished in perilous times, to an infant who was a member of a volunteer corps, were held by Lord Ellenborough to be necessities: *Coates v. Wilson*, 5 Esp. 152; and an infant, a captain in the army, was held liable to pay for a livery ordered for his servant, but not for cockades ordered for the soldiers of his company, in *Hands v. Slaney*, 8 Term Rep. 578; Lord Kenyon saying: "I cannot say that it was not necessary for a gentleman in the defendant's situation to have a servant; and if it were proper for him to have one, it was equally necessary that the servant should have a livery." Clothing supplied an infant for his or her marriage, although not suitable for ordinary occasions, may be recovered for as necessities: *Sams v. Stockton*, 14 B. Mon. 232; *Garr v. Haskett*, 86 Ind. 373; *Jordan v. Coffield*, 70 N. C. 110, 113. But apparel consisting in part of velvet and satin suits laced with gold lace, supplied an infant who was one of the gentlemen of the chamber to the Earl of Essex, was held not to be necessary, in *Mackarell v. Bachelor*, Cro. Eliz. 583; compare *Nicholson v. Spencer*, 11 Ga. 607, 610, per Warner, J.; nor are racing-jackets necessities, unless for a jockey: *Burghart v. Angerstein*, 6 Car. & P. 690, 698; and suitable clothing when supplied in an unreasonable quantity may not be recovered for: *Johnson v. Lines*, 6 Watts & S. 80; 40 Am. Dec. 542.

Medical attendance, and articles furnished for the purpose of health, may also unquestionably be recovered for as necessities: See *Saunders v. Ott*, 1 McCord, 572; *Price v. Sanders*, 60 Ind. 310, 314. Services rendered by a dentist to a minor, in filling his teeth, which were decayed and gave him pain, the work being essential for their preservation, were held to be neces-

saries, in *Strong v. Foote*, 42 Conn. 203. So a horse may be a necessary for an infant who has medical advice to take exercise on horseback: *Hart v. Prater*, 1 Jur. 623; and see *Clowes v. Brooke*, 2 Strange, 1101; And. 277; *Aaron v. Harley*, 6 Rich. L. 26; but not if the horse is purchased by the infant for purposes of pleasure or business: *Skrine v. Gordon*, 9 Ir. Rep. C. L. 479; *Beeler v. Young*, 1 Bibb, 519; *Smithpeters v. Griffin's Adm'r*, 10 B. Mon. 259, 260; *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Wood v. Losey*, 50 Mich. 475; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; but see *Mohney v. Evans*, 51 Pa. St. 80.

A common-school education is a necessary: See *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; *Saunders v. Ott*, 1 McCord, 572; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; but not a collegiate education, at least not for an infant whose wealth, station in society, genius, or talent did not suggest its special fitness and expediency: *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; certainly a professional education is not a necessary: *Bowchell v. Clary*, 3 Brev. 194; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574; and in *Smith v. Gibson*, Peake Ad. Cas. 52, Lord Kenyon was of the opinion that a sum of money advanced by the plaintiff to place out the infant wife of the defendant as an apprentice to learn millinery could not be considered a necessary.

Proper lodgings may also be included in necessities for an infant: See *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Price v. Sanders*, 60 Ind. 310, 314; *Crisp v. Churchill*, cited 1 Bos. & P. 340; and where an infant rented a house, in which he lived and exercised his calling as a barber, it was held that it was properly left to the jury to determine whether the house was a necessary or not: *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30.

Purchases made by an infant for the purpose of trading, although he thereby gain his living, on the other hand, do not bind him: *Whittingham v. Hill*, Cro. Jac. 494; and see *Dilk v. Keighley*, 2 Esp. 480; but he is liable for so much of goods supplied him to trade with as were consumed as necessities in his own family: *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693; and as just seen, he may be chargeable for the use and occupation of a house in which he carries on his business, if he also uses it as a dwelling: *Lowe v. Griffith*, 1 Scott, 458; 1 Hodges, 30. He is not liable as for necessities for advances and supplies furnished him to enable him to carry on a plantation or farm: *Decell v. Leventhal*, 57 Miss. 331; 34 Am. Rep. 449; *State v. Howard*, 88 N. C. 650, 651. Nor is he liable for a horse purchased by him to be used in farming, although he thereby supports himself and family: *Rainwater v. Durham*, 2 Nott & McC. 524; 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27; 36 Am. Dec. 296; *Wood v. Losey*, 50 Mich. 475; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; but in *Mohney v. Evans*, 51 Pa. St. 80, where a lad seventeen years of age, carrying on a farm for his mother, who was a widow, and his guardian, purchased a pair of oxen, which were received by him and his mother, and afterwards exchanged for a horse, which was used to work the farm, it was held that the question whether the purchase of the oxen was necessary should have been submitted to the jury, — a decision at variance with the weight of authority. The board of four horses for six months, the principal use of which was in the business of a hackman, is likewise not within the class of necessities for which an infant is liable, although the horses were occasionally used to carry his family out for a drive: *Merriam v. Cunningham*, 11 Cush. 40.

An infant is not liable, furthermore, as for necessities, for repairs upon his dwelling-house, although required for the prevention of immediate and seri-

ous injury to the house: *Tupper v. Cadwell*, 12 Met. 559; 46 Am. Dec. 704; *Wallis v. Burdwell*, 126 Mass. 366; *West v. Gregg's Adm'r*, 1 Grant Cas. 53. Nor is he liable for labor and materials furnished for the erection of a dwelling or other building upon his land: *Freeman v. Bridger*, 4 Jones L. 1; 67 Am. Dec. 258; *Price v. Sanders*, 60 Ind. 310, 314; *Price v. Jennings*, 62 Ind. 111; *Wornock v. Loar*, 88 Ky. 000; Dewey, J., saying in *Tupper v. Cadwell*, 12 Met. 559, 46 Am. Dec. 704: "No necessity can exist for such expenditures, solely upon the credit of the minor. The fact that he has real estate which may require supervision, and may need repairs, furnishes the proper occasion for the appointment of a guardian, through whose agency such repairs can be made, and as the law assumes, more judiciously made, than through the agency of the minor." Nor is a contract for the insurance of his property against loss or damage by fire a contract for necessities which will bind the infant absolutely: *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345. Nor is an infant liable, as for necessities, for money lent him for the purpose of removing encumbrances upon his estate: *West v. Gregg's Adm'r*, 1 Grant Cas. 53; *Magee v. Welsh*, 18 Cal. 155.

Services and expenditures of counsel in an action to recover an infant's lands are likewise not necessities: *Phelps v. Worcester*, 11 N. H. 51. "An infant's rights to his estate are not prejudiced by his infancy, and any services to sustain such rights may be ratified by the infant when he comes of age, but cannot be enforced against him as necessities": *Phelps v. Worcester*, 11 N. H. 51. But in *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434, it was held that where there is no guardian, the infant's estate is liable for the fees of counsel whose services contributed to secure it; the court saying: "It is stated in the books that the wants supplied must be personal to the infant, either for the body or the mind, in order to come within the description of necessities, and that counsel fees and expenditures in a lawsuit are generally excluded. This is, no doubt, the general rule, and for an obvious reason. Usually an infant who has an estate has a guardian, who may and should engage and pay counsel, where the interests of the infant committed to his guardianship require it. When an infant has no guardian, but has rights involved in litigation, and a lawyer has espoused the cause of the infant, and devoted his services to the protection of the interests of the infant in such litigation, and as the result of the litigation an estate has been secured to the infant, it is just and proper, and within the principle on which an infant is held liable for necessities, that the reasonable fees of such counsel should be paid out of the estate thus obtained." And see *Thrall v. Wright*, 38 Vt. 494. This is simply begging the question. The fact that the infant has no guardian is no reason why he should be able to contract concerning his estate. A guardian can easily be appointed. Nor does the fact that the services rendered have resulted in great benefit to the estate of the infant furnish a reason why he should be charged for them as for necessities. If this were so, the infant should be liable upon every contract by which he secured a benefit.

It is entirely a different matter, however, where the suit is strictly personal to the infant. Thus an infant is liable, as for necessities, for reasonable attorney's fees for defending him in a criminal action: *Askey v. Williams*, 74 Tex. 294. "We are of the opinion," says the court, "that the services of an attorney should be held necessary to an infant, where he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suit-

able to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare." So an infant is liable, as for necessities, for the reasonable services of an attorney, rendered in defending him in a bastardy proceeding, the proceeding affecting his liberty and good name: *Barker v. Hibbard*, 54 N. H. 539; 20 Am. Rep. 160. And in *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, it was held that while the ordinary fees and advances of an attorney in the prosecution of an infant's rights to property could not generally be said to be necessities, yet where such services and expenses were requisite for the personal relief, protection, and support of the infant, they may lawfully be contracted for by the infant, and he will be bound in law to pay for them. Therefore an attorney might recover of husband and wife fees for his services, and moneys expended by him in commencing and prosecuting in favor of the wife, while she was a *feme sole* and a minor, an action for breach of promise of marriage against her present husband, with whom the suit was settled by the marriage, it appearing that the services and expenses were absolutely requisite for the minor's personal relief, protection, and support, since she had been seduced and was pregnant, and was left by her relations and friends in a state of destitution and suffering. "A civil suit may, under extraordinary circumstances," says Hinman, C. J., "be the only means by which an infant can procure the absolute necessities which he requires; and where such is the case, it would be a reproach to the law to deny him the power of making the necessary contracts for its commencement and prosecution."

A number of cases of a very miscellaneous character have been decided, and remain to be noticed. Money paid at the request of an infant to relieve him from a military draft, to which he was subjected by law, was held not to come within the term "necessaries": *Dorrell v. Hastings*, 28 Ind. 478, 479. But a recognizance entered into by a minor for his personal appearance at court to answer to a criminal charge may, it was held, be classed among necessities, since the infant thereby secured his personal freedom: *State v. Weatherwax*, 12 Kan. 463, 464; and see also *Clarke v. Leslie*, 5 Esp. 28. A settlement which affords a provision to an infant who on her marriage has no other certain provision was decided in England to be a necessary, for the costs of preparing which she was accordingly liable to solicitors whom she engaged: *Helps v. Clayton*, 17 Com. B., N. S., 553. And an infant widow was held bound by her contract, as for necessities, for the funeral expenses of her husband, who left no property to be administered: *Chapple v. Cooper*, 13 Mees. & W. 252. A bridal outfit, including a chamber set, furnished an infant before her marriage, may be classed as necessities: *Jordan v. Coffield*, 70 N. C. 110, 113; and see also *Garr v. Haskett*, 86 Ind. 373; *Same v. Stockton*, 14 B. Mon. 232. In *Hill v. Arbon*, 34 L. T. 125, where an infant, who was sole manager of a farm belonging to his father, and who had some expectations, bought on credit a pair of spurs, a suit of kersey horse-clothing, a hunting breastplate, a set of harness, a saddle, and other articles of like nature, it was held that there was reasonable evidence to go to the jury, considering the position of the infant, that the goods supplied were necessities, or, as Blackburn, J., well put it, "proprieties." But in *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542, the court drew the line at an account against an infant, which footed up to more than one thousand dollars, "comprising charges for many articles which might be ranked with necessities when supplied in reason, but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons in the space of fifteen months and twenty-one days;

to say nothing of three bowie-knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag to match; and in *Saunders v. Ott*, 1 McCord, 572, the court refused to allow for "liquor, pistols, powder, saddles, bridles, whips, fiddles, fiddle-strings, etc., amounting to \$111.53½." And also in *Jenner v. Walker*, 19 L. T. 398, Cockburn, C. J., thought that betting-books, especially rich and costly ones, could not be necessities. Balls and serenades cannot be accounted necessities, even in case of a nobleman: *North and Thompson's Case*, cited Cart. 216.

An infant lieutenant in the English royal navy was held not answerable for the price of a chronometer, as a necessary, in *Berolles v. Ramsay*, Holt N. P. 77. But Baron Parke thought that breastpins and a watch-chain, furnished the eldest son of a gentleman of fortune and member of Parliament, who was an undergraduate of the University of Cambridge, might be necessities; "the former [the breastpins] might be either of necessity or of ornament; the usefulness of the other might depend on this: whether the watch was necessary. If it was, then the chain might become necessary itself." In *Ryder v. Wombwell*, L. R. 4 Ex. 32, an infant, the son of a baronet, and having an income of five hundred pounds a year, with the prospect of twenty thousand pounds on attaining his majority, bought on credit a pair of jeweled solitaire shirt-sleeve buttons worth twenty-five pounds, and a silver goblet worth fifteen pounds fifteen shillings, the latter for presentation to a friend at whose house he was staying. No evidence was given of anything peculiar in his station rendering it exceptionally necessary for him to have such articles. The jury, in answer to the question put to them, found that the articles were necessities, and suitable to the infant's station and degree. It was held that as the *onus* was on the plaintiff seeking to recover, and as he gave no evidence to show that the articles were necessities, the question ought not to have been left to the jury. But in *Jenner v. Walker*, 19 L. T. 398, Chief Justice Cockburn thought that a present of amethyst and diamond ear-rings, by a young gentleman who had an income of from seven hundred to one thousand pounds per annum, to a young lady to whom he was engaged to be married, and who eventually became his wife, were necessities.

Dinners, confectionery, and fruit supplied to an infant, an undergraduate of Cambridge, having lodgings in town, are *prima facie* not necessities, according to *Brooker v. Scott*, 11 Mees. & W. 67; and in an action brought against him for such supplies, no special circumstances being shown, the court directed a nonsuit; and in another case, on a very similar state of facts, it was held that in default of explanation, the court should decide the articles not to be necessities, as a matter of law; but that in case of explanation, as if fruit or other articles were supplied in illness, the question whether they were necessities or not should be left to the jury, with proper directions: *Wharton v. Mackenzie*, 5 Q. B. 608. So if there is no evidence to show that cigars and tobacco are necessary, medicinally or otherwise, in a particular case, the question should not be left to the jury: *Bryant v. Richardson*, L. R. 3 Ex. 93, note.

In an action to recover £150, the purchase price of a hunter sold by the plaintiff to the defendant, in which there was a plea of infancy, and a replication of necessities, it appeared that the defendant was an English youth on a visit to a country hunting gentleman in Ireland. At the time of the bargain, he stated that he was a member of the Surrey Stag Hunt, and was accustomed to hunt his step-father's horses, and talked of being allowed six hundred pounds a year by his step-father. It was held that there was no evi-

dence which could be properly left to the jury that the hunter was a necessary: *Skrine v. Gordon*, 9 Ir. Rep. O. L. 479. In *Beeler v. Young*, 1 Bibb, 519, a horse saddle and bridle were held not to be necessities, for which an infant would be liable; and see also *Smithpeters v. Griffn's Adm'r*, 10 B. Mon. 259, 260. But a horse, as said before, might be a necessary, if exercise on horseback be recommended by a physician: *Hart v. Prater*, 1 Jur. 623; and see *Clowes v. Brooke*, 2 Strange, 1101; And. 277; *Aaron v. Harley*, 6 Rich. L. 28.

Money advanced for the traveling expenses of an infant on a pleasure trip cannot be recovered as a necessary: *McKanna v. Merry*, 61 Ill. 177; but, plainly, traveling expenses under different circumstances might be a necessary: See *Breed v. Judd*, 1 Gray, 455, 458. Money paid by a master for coach fares for the mother of his infant servant is not a necessary, and therefore cannot be deducted from the wages of the servant: *Hedgeley v. Holt*, 4 Car. & P. 104. In *Charters v. Bayntam*, 7 Car. & P. 52, it was left to the jury to say whether a stanhope was a necessary for an infant, under the circumstances, for the hire and repair of which he was liable; but in *Howard v. Simpkins*, 70 Ga. 322, a buggy was held not to be an article of necessity for an infant; and in *Pyne v. Wood*, 145 Mass. 558, a bicycle was held not to be a necessary for an infant seventeen years of age, who lived with his father, and worked in a shoe-shop a mile from his father's house, and who went home for his dinner, and was allowed to be absent an hour.

INFANT IS LIABLE FOR NECESSARIES FURNISHED HIS WIFE AND FAMILY, as well as those furnished himself, and for the same reason: *Hill and Blacton's Case*, 1 Sid. 112; *Turner v. Trisby*, 1 Strange, 168; *Turberville v. Whitehouse*, 1 Car. & P. 94, affirmed in 12 Price, 693; *Rivers v. Gregg*, 5 Rich. Eq. 274, 278; *Cantine v. Phillips's Adm'r*, 5 Harr. (Del.) 428; *Price v. Sanders*, 60 Ind. 310, 315; *Chapman v. Hughes*, 61 Miss. 339.

LIABILITY FOR MONEY BORROWED OR ADVANCED FOR NECESSARIES.—As before observed, under the head "Lending and Borrowing of Money," it seems to be the rule that an infant is not liable at law for money borrowed by him to pay for necessities, although actually expended by him for that purpose, but that he is liable for money directly applied by the lender in procuring necessities for him: *Rearsby and Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Harle v. Peale*, 10 Mod. 67; 1 Salk. 386; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197; 1 Ld. Raym. 344; *Probart v. Knouth*, 2 Esp. 472, note; *Clarke v. Leslie*, 5 Esp. 28; *Hedgeley v. Holt*, 4 Car. & P. 104, 105; *Bateman v. Kingston*, 6 L. R. Ir. 328; *Swift v. Bennett*, 10 Cush. 436; *Randall v. Sweet*, 1 Denio, 460; *Smith v. Oliphant*, 2 Sand. 306; *Price v. Sanders*, 60 Ind. 310; *Beeler v. Young*, 1 Bibb, 519. But in equity the infant is liable for money borrowed and actually applied by him for the payment of necessities: *Marlow v. Pitfield*, 1 P. Wms. 558; *Hickman v. Hall's Adm'r's*, 5 Litt. 338, 342; *Watson v. Cross*, 2 Duvall, 147, 149; *Price v. Sanders*, 60 Ind. 310. The reason why an infant is not liable at law for money borrowed by him to pay for necessities, although actually expended by him for that purpose, is usually stated to be that the lender, by intrusting the money to the infant, enables him to waste and misapply it, and his subsequent proper use of it could not confer an action when none existed, upon the contract of lending at the time of the loan. We think, however, that the true reason why the lender cannot recover at law is the want of privity between the lender and the one who supplies the necessities: See *Bradley v. Pratt*, 23 Vt. 378, 386, per Redfield, J.; and see, in this connection, the remarks of Dargan, C., in *Rivers v. Gregg*, 5 Rich. Eq. 274.

In conformity with these rules, if an infant gives a note for necessities, signed by a surety, the surety who afterwards pays the note is entitled to recover the amount so paid from the infant: *Conn v. Coburn*, 7 N. H. 368; 28 Am. Dec. 746; *Haine's Adm'r v. Tarrant*, 2 Hill (S. C.) 400; and see *Dial v. Wood*, 9 Baxt. 296; *contra*, *Ayers v. Burns*, 87 Ind. 245; 44 Am. Rep. 759.

DISAFFIRMANCE. — The rules concerning the disaffirmance of their contracts by infants relate simply to those contracts which are voidable. Such contracts as are binding upon them, either by virtue of the common law or by statute, very plainly cannot be avoided on the ground of infancy. And should a statute make any or all of their contracts absolutely void, or should the notion be persisted in, contrary to principle and authority, that certain of their contracts are void at the common law, there can obviously be no disaffirmance in the proper sense of the word; for the contracts being mere nullities, there is nothing to disaffirm. In regard to their voidable contracts, it can be laid down as a general rule that they may be avoided by the infant contracting parties, whether the contracts be completely executory or executed, or whether executory on either side and executed on the other. The idea sometimes entertained that a contract entirely executed is not subject to disaffirmance by the infant because it is executed must necessarily be erroneous, unless it be true that certain contracts are no longer voidable when executed; for a contract cannot be voidable by him, and yet be binding upon him. It is certainly not true that the great mass of infants' contracts are binding when executed, and we do not believe it is ever true, either upon principle or authority, that any contract which an infant may make ceases to be voidable when and because it is executed. It may be that an infant is sometimes required to restore the consideration which he may have received on his disaffirmance, and, where this is a money payment, and he seeks to recover money, that the law, to avoid circuity of action, will leave the parties, so far as the infant has been compensated, in the condition in which it finds them; but this is merely an incident of the execution of the contract: See *supra*, "Service."

We may again observe, in this connection, that all voidable contracts of infants are binding until disaffirmed by them. It is not the rule that they are nugatory until ratified, but that they are good until avoided. If a contract has been ratified, it is then no longer subject to disaffirmance; but until it is ratified, it may be disaffirmed. These propositions are necessarily involved in the idea of a voidable contract. It makes no difference whether the contract be executory or executed, although it may be that a ratification will be held to result from slighter acts and circumstances in the latter case than in the former. See a distinction between executory and executed contracts, as to their binding force, noticed and criticised *supra*, title "Void and Voidable."

DISAFFIRMANCE OF PART OF TRANSACTION. — If an infant enters into several distinct and separate contracts he may evidently disaffirm one or more, and not the others. Thus he may, on arriving at full age, disaffirm one of several deeds made by him during his minority, and leave the others to have legal effect as if made when of full age: *Tunison v. Chamblin*, 88 Ill. 378, 387. But he cannot affirm a portion of a single transaction, and disaffirm the rest. He must abide by it, or disaffirm it *in toto*. If he ratifies a part of the agreement, he ratifies it all. Therefore if a contract be upon a condition, if he wishes to accept the contract he must accept it in its entirety, with the condition: *Biederman v. O'Conner*, 117 Ill. 493; *Lowry v. Drake's Heirs*, 1 Dana, 46. So infants cannot, on coming of age, adopt their agreement for the partition of

lands in part, but may be compelled in equity to elect either to confirm the agreement or to relinquish all rights and pretensions resulting from it: *Overbach v. Heermance*, 1 Hopk. Ch. 337; 14 Am. Dec. 546. And where an infant purchased a kettle and other articles of personal property, and gave his note for the price, under an agreement that he might return the kettle if it did not answer his purposes, and after he came of age the vendor requested him to return it if he did not intend to keep it, but he retained it and used it for several months afterwards, it was held that he thereby ratified the contract as to the kettle, and consequently the entire contract, and therefore an action was maintainable against him on the note: *Aldrich v. Grimes*, 10 N. H. 194. And where an infant sells a horse, and receives the vendee's notes for the price, he affirms the contract in all respects by bringing an action on the notes after coming of age; and hence he cannot, by pleading his infancy, preclude the defendant from offsetting damages for a breach of warranty on the sale of the horse: *Morrill v. Aden*, 19 Vt. 505.

Again, an infant who purchases land or chattels cannot, on coming of age, retain the property and repudiate his note given for the price, or other agreement upon which he obtained the property: *Kitchen v. Lee*, 11 Paige, 107; 42 Am. Dec. 101; *Henry v. Root*, 33 N. Y. 526; *Weed v. Beebe*, 21 Vt. 495; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54; *Armfield v. Tate*, 7 Ired. L. 258; *Bennett v. McLaughlin*, 13 Ill. App. 349; not even by showing that a partial payment made by him was equal to the entire value of the property; *Bennett v. McLaughlin*, 13 Ill. App. 349. Thus in *Kitchen v. Lee*, 11 Paige, 107, 42 Am. Dec. 101, a retiring partner assigned his interest in the partnership property to his copartner, on condition that the latter would pay the debts of the firm. The assignee subsequently refused to pay the debts, on the ground of infancy. It was held that he could not retain the partnership effects, and at the same time refuse to perform the condition upon which they were assigned to him. Where, too, an infant purchases land or chattels, and gives back a mortgage thereon to secure the price, the conveyance or transfer and the mortgage constitute but one transaction, and the infant cannot avoid the mortgage without also avoiding the conveyance or transfer, or in other words, he cannot repudiate the one and affirm the other; and if, after coming of age, he ratifies the purchase, he thereby necessarily ratifies the mortgage: *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Heath v. West*, 28 N. H. 101; *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Ottman v. Moak*, 3 Sand. Ch. 431; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Richardson v. Boright*, 9 Vt. 368; *Young v. McKee*, 13 Mich. 552; *Curtiss v. McDougal*, 26 Ohio St. 66; *Callis v. Day*, 38 Wis. 643; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Betts v. Carroll*, 6 Mo. App. 518. "Nothing is clearer," says the court in *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589, "than that a party cannot affirm an entire contract in part and avoid it in part; and to allow the plaintiff to avail himself of the deed conveying the land to him, and to avoid the mortgage given by him to secure the purchase-money, would be no less repugnant to law than to the plainest dictates of justice." So in a suit to enforce a lien for the purchase-money reserved on the face of a deed, the infancy of the grantee is no defense, the land being still retained by him: *Smith v. Henkel*, 81 Va. 524. And where an infant purchases land, and assumes the payment of mortgages as a part of the purchase price, and afterwards, and during her minority, procures a loan, and mortgages the land to pay off the prior encumbrances, if she ratifies the purchase of the land by dealing with it as owner, after her majority, she thereby ratifies her agreement to pay the existing

mortgages, and also ratifies the manner in which she dealt with those mortgages, and consequently ratifies the subsequent mortgage given to secure the money borrowed by her to satisfy them: *Langdon v. Clayson*, 75 Mich. 204. So, it is held, a surety on an infant's note for the purchase price of chattels who has satisfied a judgment recovered on the note, and received from the infant a note for the amount so paid secured by a mortgage of the same chattels, is entitled to be subrogated to the rights of the vendor, who, had he taken the mortgage for the price, would have been entitled to enforce it: *Knaggs v. Green*, 48 Wis. 601; 33 Am. Rep. 838.

DISAFFIRMANCE IS NOT A FRAUDULENT ACT which will avoid it, or render the infant liable at law as for fraud, or against which a court of equity will relieve on that ground: *Tucker v. Moreland*, 10 Pet. 59, 77; 1 Am. Lead. Cas. *224 *234; *Clamorgan v. Lane*, 9 Mo. 442, 471; *Huth v. Carondelet etc. R'y Co.*, 56 Mo. 202, 210; *Burns v. Hull*, 19 Ga. 22; *Seabrook v. Gregg*, 2 S. C. 68; *Brantley v. Wolf*, 60 Miss. 420, 430. In *Tucker v. Moreland*, 10 Pet. 59, 77, 1 Am. Lead. Cas. *224, *234, Story, J. says: "In many cases the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness, and misconduct"; and again, it is said in *Brantley v. Wolf*, 60 Miss. 420, 430, "in one sense it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits, and thereafter to repudiate it to the prejudice of the other party; but legal fraud cannot be predicated of such conduct by a minor where it has been unmarked with any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability, and of this right all men are bound to take notice." As to whether an infant will be estopped from availing himself of his infancy as against a contract entered into through his concealments or misrepresentations, see *supra*, "Infant's Concealment or Misrepresentation as to Age, etc."; and as to his liability in damages for his frauds, and other torts connected with his contracts, see *post*, "Torts of Infants Connected with Contracts."

DISAFFIRMANCE AS AGAINST SUBSEQUENT BONA FIDE PURCHASER. — The protection of *bona fide* purchaser for value, and without notice, does not avail as against an infant's right to disaffirm his contract. His right to avoid his contract is an absolute and paramount right, superior to all equities of other persons. Therefore a purchaser of personal property from the vendee of an infant, although a purchaser for value, and without notice, cannot hold the property as against the infant who chooses to rescind his contract of sale: *Hill v. Anderson*, 5 Smedes & M. 216. Nor is a *bona fide* holder of a negotiable instrument for value before maturity, and without notice, protected against the plea of infancy: *Howard v. Simpkins*, 70 Ga. 322; Tiedeman on Commercial Paper, sec. 280. And an infant may avoid his deed of conveyance, or executory contract to convey real property, as against a subsequent *bona fide* purchaser from his grantee or vendee for value, and without notice of the fact of infancy: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 213; *Harrod v. Myers*, 21 Ark. 592; 76 Am. Dec. 409; *Jenkins v. Jenkins*, 12 Iowa, 195, 200; *Miles v. Lingerian*, 24 Ind. 385; *Sims v. Smith*, 86 Ind. 577; *Buchanan v. Hubbard*, 96 Ind. 1; *Brantley v. Wolf*, 60 Miss. 420; *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; "the right of the infant to avoid his contracts is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against *bona*

side purchasers from the grantee": *Brantley v. Wolf*, 60 Miss. 420; and in *McMorris v. Webb*, 17 S. C. 553, 43 Am. Rep. 629, in which dower was claimed by a widow who had renounced it during her infancy, it was said: "The plea of purchaser for valuable consideration without notice is equitable in its character, and has no proper application to a claim purely legal, like that for dower." The fact that an infant induced a person to purchase his land upon the faith of his representation that he was of full age, it has also been held, cannot avail such purchaser in a contest between him and an innocent purchaser to whom the grantor made a subsequent conveyance after he became of age: *Vallandigham v. Johnson*, 85 Ky. 288.

DISAFFIRMANCE OF PREVIOUS DEED, WHERE SUBSEQUENT GRANTEE HAS NOTICE THEREOF.—If an infant disaffirms his deed of conveyance by the execution, after he reaches majority, of another deed to a different person, the second deed is not rendered fraudulent and void from the fact that the grantee had notice of the prior deed made during infancy. The privilege of an infant to disaffirm his contracts might be of little value to him if he were permitted to dispose of the property previously conveyed to such persons only who had no notice of that conveyance: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Clamorgan v. Lane*, 9 Mo. 442, 471. "The transaction is not, however, favored by a court. If the party purchasing under such circumstances gets the legal advantage, he will not be deprived of it; but further than this, the court is under no obligation to go": *Clamorgan v. Lane*, 9 Mo. 442, 471. It has been held, also, that if an infant conveys his land, and on attaining his majority, ratifies the conveyance, and then conveys to another person for a valuable consideration, the second grantee, having notice of the deed made in infancy, but no notice of the ratification, is entitled to hold the land: *Black v. Hills*, 36 Ill. 376; 87 Am. Dec. 224; the court saying: "The argument that the subsequent purchaser takes with knowledge that the grantor may have ratified, and therefore takes subject to that risk, would apply as well to all conveyances. For in every instance where a deed is made, the grantee knows that the grantor may have made a former conveyance, and it is precisely to protect the innocent purchaser against such chances that our registry laws are enacted." And again, the court says: "It can in no just sense be said that the grantee of a person who had conveyed during his infancy is not to be deemed an innocent purchaser, if he has notice of the first deed. He has as perfect a legal right to purchase land which his grantor had sold during minority as he would have to purchase land that had never been conveyed at all." We stop to remark that this latter language is a little strong. Finally, it was observed: "If the ratification is by means of a written instrument, it is within the policy of the registry laws. . . . If the ratification is by acts *in pais*, then a subsequent purchaser must be affected with notice of those acts."

DISAFFIRMANCE IS QUESTION OF INTENTION, TO BE INDICATED BY SOME POSITIVE ACT.—It is almost a self-evident proposition that there can be no disaffirmance of a contract unless there is an intention to disaffirm on the part of the infant, and that this intention must be indicated by some positive act inconsistent with the continued validity of the contract: *Illinois Land and Loan Co. v. Beem*, 2 Ill. App. 390; *Dixon v. Merritt*, 21 Minn. 196; *Roberts v. Wiggins*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40. And where a female infant conveyed her real estate to trustees, by way of marriage settlement, it is not sufficient to compel a purchaser of the land from her, after attaining her majority, to accept a conveyance, to allege that no act had been done or caused to be done by her after coming of age in confirmation of the deed of settle-

ment; but it must be alleged and proved that she has, since coming of age, by some positive act, disaffirmed such deed, the deed of an infant not being as a matter of course superseded and annulled by the mere execution, after he attains his age, of another deed to another person: *Dominick v. Michael*, 4 Sand. 374; and see also *Voorhies v. Voorhies*, 24 Barb. 150, 153. It is not necessary, however, that the infant should expressly disaffirm his contract. It may be enough if the act of disaffirmance be inconsistent with it: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 338; 76 Am. Dec. 209, 212. This proposition finds a frequent illustration in those cases where an infant's deed is held to be disaffirmed by the execution, on coming of age, of another deed of the same premises to another person: See post, "Execution of Second Deed, Mortgage, or Lease." A disaffirmance, involving, as it does, a mental condition, "necessarily implies the action of a free mind, exempt from all constraint or disability": *Sims v. Everhardt*, 102 U. S. 300, 312.

ACT OF DISAFFIRMANCE, WHETHER REQUIRED TO BE OF EQUAL SOLEMNITY AS ACT DISAFFIRMED. — It seems that a feoffment of an infant with livery of seisin could only be avoided by an entry when he came of age which was an act of equal notoriety, or by writ of *dum fuit infra aetatem*: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Dominick v. Michael*, 4 Sand. 374, 421; *Vallandingham v. Johnson*, 85 Ky. 233, 293. Some few early cases have taken the view that deeds operating under the statute of uses and statutory grants executed by infants must be disaffirmed by entry, or some other act of equal notoriety with the original conveyance; a re-entry, however, not being indispensable, as in case of feoffments: See *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Voorhies v. Voorhies*, 24 Barb. 150; and see *Dominick v. Michael*, 4 Sand. 374, 421. And there can certainly be no question that if the disaffirming act is of equal notoriety with the deed or other contract, it is all that the law requires: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 338; 76 Am. Dec. 209, 212; *Vallandingham v. Johnson*, 85 Ky. 233, 292; and see *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. The better opinion, however, is, that any act of the infant un equivocally manifesting an intention to disaffirm his deed or contract generally is sufficient: *Drake's Lessees v. Ramsay*, 5 Ohio, 251, 253; *White v. Flora*, 2 Over. 423, 431; *State v. Plaisted*, 43 N. H. 413; *Cogley v. Oushman*, 16 Minn. 397, 402; *Chapin v. Shafer*, 49 N. Y. 407; *Long v. Williams*, 74 Ind. 115; *Allen v. Poole*, 54 Miss. 323, 331; *McCarthy v. Nicross*, 72 Ala. 332, 335; 47 Am. Rep. 418, 420; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225; *Bagley v. Fletcher*, 44 Ark. 153; and see *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40. Thus in *Drake's Lessees v. Ramsay*, 5 Ohio, 251, 253, Mr. Justice Lane observes: "Some of the books apparently suppose that the act of avoidance must be of equal solemnity with the act of grant. But I cannot find it to be expressly decided, except in case of feoffments, where a peculiar feudal principle renders it necessary. We believe that an entry, suit, or action, a subsequent conveyance, an effort to restore parties to their original condition, or an act unequivocally manifesting the intention, would render the avoidance effectual." And in *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225, Martin, C., says: "The ancient doctrine, which required the disaffirming act to be of as high and solemn a character as the act disaffirmed, has no place in modern law. The disaffirming act need take no particular form or expression. The deed of a minor may be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument."

It may be here stated that a distinction has been made between the nature

of the acts which are sufficient to ratify an infant's deed or other contract, and those which are required to disaffirm it. "There is," says Strong, J., in *Irvine v. Irvine*, 9 Wall. 617, 627, "a well-recognized distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those that are sufficient to confirm it. . . . There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant's deed is not void; it passes the title of the land to the grantee. Now, if the deed be avoided, the ownership of the land is retransferred. The seisin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no seisin. It is therefore itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner."

PARTICULAR ACTS WHICH WILL AMOUNT TO DISAFFIRMANCE.—The foregoing general propositions, that disaffirmance is a question of intention to be indicated by some positive act on the part of the infant, and that any act of his unequivocally manifesting an intention to disaffirm his contract will be sufficient for that purpose, will now be illustrated.

A distinct and unequivocal assertion of ownership over property sold during minority which results in obtaining its possession is such a disavowal of the contract by the infant as will relieve the purchaser from his obligation to pay for the same; but the acts of ownership must be distinct and unequivocal: *Harris v. Musgrove*, 59 Tex. 401. And where an infant purchased personal property, and gave his promissory note for the price, his tender of the property to the payee, with a demand of the surrender of the note, annuls the contract on both sides: *Hoyt v. Wilkinson*, 57 Vt. 404.

RE-ENTRY IN CASE OF CONVEYANCES.—It has been seen under the preceding title but one that a re-entry by the grantor, after coming of age, upon land conveyed during his infancy, for the purpose of avoiding the deed, will have that effect, although other acts besides re-entry may be sufficient, except, perhaps, in case of feoffments. *A fortiori* would this be true if coupled with other acts indicating a disaffirmance. Thus a re-entry, with notice of disaffirmance, will avoid the deed: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. Again, in *White v. Flora*, 2 Over. 426, 431, an infant, on coming of age, expressed himself to the effect that he would never agree to a deed executed by him during infancy, instituted a search for the land, entered upon it, and made an agreement to convey it. It was held that his deed was thereby disaffirmed. As to whether an entry is ever necessary before the execution of another deed of the lands to a different person, or before bringing ejectment for the lands, after the infant comes of age, see post, "Execution of a Second Deed," and "Disaffirmance by Suit."

NOTICE OF DISAFFIRMANCE.—A notice of disaffirmance of his deed executed during infancy, given by the grantor after coming of age, is a sufficient act of avoidance: *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115; *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 36, 40; especially if coupled with a re-entry: *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233, 234. If this is true of his deeds of conveyance, it is certainly true of his contracts in general.

SALE OF PERSONAL PROPERTY PREVIOUSLY MORTGAGED by the infant to another person very plainly indicates an intention to avoid the mortgage,

and hence will amount to a disaffirmance of it, if the sale be absolute and unconditional: *Chapin v. Shafer*, 49 N. Y. 407; *State v. Plaisted*, 43 N. H. 413; *State v. Howard*, 88 N. C. 650.

EXECUTION OF A SECOND DEED, MORTGAGE, OR LEASE. — An infant's deed operating under the statute of uses, or his statutory conveyance, it is well settled, is disaffirmed by his execution, after attaining majority, of a like absolute and inconsistent deed of conveyance to another person: *Frost v. Wolverston*, 1 Strange, 94; *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead Cas. *224; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Roberts v. Wiggins*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 326; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Harris v. Cannon*, 6 Ga. 382; *Pitcher v. Laycock*, 7 Ind. 398; *Riggs v. Fisk*, 64 Ind. 100; *Long v. Williams*, 74 Ind. 115; *Loscy v. Bond*, 94 Ind. 67, 70; *Oresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *McGan v. Marshall*, 7 Humph. 121; *Youse v. Norcoma*, 12 Mo. 549, 564; 51 Am. Dec. 175; *Norcom v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214; *Peterson v. Laik*, 24 Mo. 541; 69 Am. Dec. 441; *Hastings v. Dollarhide*, 24 Cal. 195; *Davson v. Helmes*, 30 Minn. 107; *Bagley v. Fletcher*, 44 Ark. 153; *Haynes v. Bennett*, 53 Mich. 15; *Corbett v. Spencer*, 63 Mich. 731; *Vallandigham v. Johnson*, 85 Ky. 238. This is so at the present time in Georgia, by statute: Code 1882, sec. 2694. The execution of the subsequent inconsistent deed by the grantor after attaining majority indicates an intention not to be bound by the previous conveyance, and the latter is consequently thereby avoided. There can be no doubt about the proposition where the subsequent deed is a grant, bargain, and sale or a warranty deed, or a deed in the form prescribed by statute; but it has also been held that a quitclaim deed may operate as a disaffirmance of a prior deed, executed during minority, to a different person, since a quitclaim deed is, in this country, a substantive mode of conveyance, and is as effectual to carry all the right, title, interest, claim, and estate of the grantor as a deed with full covenants: *Bagley v. Fletcher*, 44 Ark. 153.

No entry by the grantor is ever necessary for the purpose of avoiding the previous deed executed during infancy, and for the purpose of making the subsequent deed effective, where the land is vacant and unoccupied at the time of the execution of the latter, or, of course, where the grantor remains in possession; but if the land is at that time in the adverse possession of the first grantee or other persons, then, in those states where land adversely held cannot be conveyed, at least to all intents and purposes, the grantor, before executing the subsequent deed, must make an entry: *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. *224; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Dominick v. Michael*, 4 Sand. 374; *Den ex dem. Murray v. Shanklin*, 4 Dev. & B. 289; *Harris v. Cannon*, 6 Ga. 382; *Harrison v. Adcock*, 8 Ga. 68; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442, 445; compare *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320; *Pitcher v. Laycock*, 7 Ind. 398. It is sometimes said, under this view, that if the land is held adversely, the subsequent deed would be void, and could not operate as a disaffirmance of the prior deed executed during infancy; but, we take it, the correct rule is that announced by *Riggs v. Fisk*, 64 Ind. 100, namely, that if the land is held adversely by one claiming under the first deed or otherwise, the grantor, before he can make the second deed effectual for all purposes, must first obtain possession by entry or other proper proceedings; but while the second deed, made by the minor after he arrives at

full age, will not be fully operative against the third person in adverse possession, it is nevertheless good between the parties and as to the rest of the world, and operates as a disaffirmance of the first deed, and authorizes the second grantee to prosecute a suit in the name of the grantor for the recovery of the land. In many states, land in the adverse possession of another may be conveyed without any objection whatever; and where this is the case, a subsequent deed, executed by the grantor after attaining his majority, is as completely effective to disaffirm his prior deed made during minority, when the land is adversely held at the time, as when it is vacant and unoccupied, or when he is himself in possession, and no entry whatever is required: *Orestinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Norcum v. Sheahan*, 21 Mo. 25; 64 Am. Dec. 214; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *Haynes v. Bennett*, 53 Mich. 15; and see *Allen v. Poole*, 54 Miss. 323, 331; and this is now the rule in Georgia: Code 1882, secs. 2694, 2695.

If a minor executes a deed of conveyance, and after arriving at age, gives a mortgage on the land conveyed, this will amount to a disaffirmance of the deed, for it implies that he still considered himself the owner; but it would be otherwise if he joined with the grantee in executing the mortgage to secure a debt of the grantee: *Watkins v. Wassell*, 15 Ark. 73. And the execution by an infant, after attaining majority, of a warranty deed of land mortgaged during infancy is a disaffirmance of the mortgage: *Dixon v. Merritt*, 21 Minn. 196; compare *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, where the warranty deed was executed during infancy. The same is said to be true of an ordinary absolute deed making no allusion to the mortgage: *Allen v. Poole*, 54 Miss. 323; but we think the contrary opinion is the correct one, since the mortgage and the deed are not inconsistent, but may well stand together: *Palmer v. Miller*, 25 Barb. 399; especially where the deed is a quitclaim deed: *Singer Mfg. Co. v. Lamb*, 81 Mo. 221. If, however, the deed recites that the conveyance is subject to a mortgage, the mortgage is thereby confirmed: *President etc. of Boston Bank v. Chamberlin*, 15 Mass. 220; *Loosey v. Bond*, 94 Ind. 67.

Again, if an infant sells a tract of land, and executes a title bond, and on coming of age sells the land to another person, and executes to him a title bond, the first contract is thereby avoided: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

But, as said in *Dominick v. Michael*, 4 Sand. 374, 421, "the deed of an infant is not as a matter of course superseded and annulled by the mere execution, after he attains his age, of another conveyance, even to a purchaser for value." The instruments must be inconsistent. "If the minor, after reaching his majority," says Martin, C., in *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, 225, "has expressly repudiated his deed, there remains nothing for construction. But when the disaffirmance proceeds from the acts of the minor after reaching majority, they must in their nature imply a repudiation of the voidable instrument. If they are consistent with the continued existence of such instrument, there is no disaffirmance, and the deed remains unaffected." Therefore a deed which purports to convey the grantor's right and interest in any lands in a certain town, not theretofore conveyed by the grantor, does not embrace lands sold by the grantor during her infancy: *Philips v. Green*, 3 A. K. Marsh. 7; 13 Am. Dec. 124; and where a minor conveyed her interest in a tract of land, and afterwards acquired another interest by inheritance, a deed subsequently executed by her, after majority, conveying simply her right, title, and interest in the tract, does not avoid the prior deed: *Leitensdorfer v. Hempstead*, 18 Mo. 289; and also where a

purchaser from the grantee of an infant took a quitclaim deed from the infant after he came of age, the latter deed only operates as a confirmation of the first, and does not take precedence over a mortgage given by the original grantee of the infant, subject to which the second grantee purchased the property: *Eagle Fire Co. v. Lent*, 6 Paige, 635, affirming 1 Edw. Ch. 301. Again, a conveyance by an infant of a tract of land, part of a larger tract in which he was interested as heir of his father, is not disaffirmed by the execution of a deed, after attaining majority, to another person, of all his "right, title, interest, and claim in and to the estate" of his father: *Stuart v. Baker*, 17 Tex. 417, 421; but, as already seen, if the quitclaim were exactly co-extensive with the previous deed, it is held to be a disaffirmance: *Bagley v. Fletcher*, 44 Ark. 153; and a quitclaim deed or any other deed, unless, perhaps, a warranty deed, will not operate to disaffirm a mortgage executed by the grantor to another person during infancy: *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Palmer v. Miller*, 25 Barb. 399; *Dixon v. Merritt*, 21 Minn. 196; but see *Allen v. Poole*, 54 Miss. 323. A subsequent deed of trust to secure debts, not being inconsistent with a prior mortgage executed during infancy, will not operate as a disaffirmance of the mortgage: *McGan v. Marshall*, 7 Humph. 121; compare *Inman v. Inman*, L. R. 15 Eq. 260. And a lease by an infant is not avoided by the mere execution of a second lease of the same lands, made to another person by the infant on his attaining full age, since both contracts might stand together, the one as a lease and the other as a grant of the reversion; and it is held an estate, though voidable, having passed under the first lease, and the lessee being in possession thereunder when the infant became of age, the estate could not be divested but by some act of notoriety, as ejectment, entry, demand of possession, or the like, or, at least, notice: *Slator v. Brady*, 14 Ir. C. L. 61.

Whether a deed executed by a grantor after attaining majority amounts to a disaffirmance of a previous deed of the same land made by him during infancy, is held to be a question of law for the determination of the court, and should not be submitted to the jury: *Peterson v. Luik*, 24 Mo. 541; 69 Am. Dec. 441.

DISAFFIRMANCE BY SUIT. — Under the common-law theory of the action of ejectment, which regards the defendant as a trespasser, it has been held that an infant could not, on arriving at full age, maintain the action to recover lands conveyed during his infancy, without a previous entry, notice, or other act in disaffirmance of the deed: *Boal v. Miz*, 17 Wend. 119; 31 Am. Dec. 285; *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300; *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; and in *Law v. Long*, 41 Ind. 586, this rule was extended to a statutory action to obtain an assignment of dower in lands conveyed. Thus in *Clawson v. Doe ex dem. Moore*, 5 Blackf. 300, it is said: "The action of ejectment is an action of trespass, and the defendant is always regarded by the plaintiff as a trespasser. Hence, where an individual is in the possession of land with the permission or acquiescence of the owner, a suit cannot be sustained against him for the possession without a notice to quit, or until there be a demand of possession and a refusal, or until he be guilty of some other act which will make him a wrong-doer."

This may be very true; yet we think the courts have overlooked the fact that a disaffirmance of his deed by an infant makes it void *ab initio*, and therefore those in possession under it may very well be regarded as trespassers, at least so far as it may be necessary to maintain ejectment without any previous act on the part of the grantor. And it is in accordance with the

decided weight of authority that a deed executed by the grantor during infancy is disaffirmed by the mere institution of a suit by him, after coming of age, to recover possession of the land conveyed, without any previous act, whether the suit be ejectment, — especially ejectment as it at present exists in most of the states, writ of entry, or summary or other statutory proceedings: See *Drake's Lessee v. Ramsey*, 5 Ohio, 251, 253; *Hughes v. Watson*, 10 Ohio, 127, 134; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 324; *Chadbourn v. Rackliff*, 30 Me. 354; *Webb v. Hall*, 35 Me. 336; *Walker v. Ellis*, 12 Ill. 470 (contract to sell); *Cole v. Pennoyer*, 14 Ill. 158, 162; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381, 383; *Harrie v. Ross*, 86 Mo. 89; 56 Am. Rep. 411; *Clark v. Tate*, 7 Mont. 171; *Craig v. Van Bebbler*, 100 Mo. 584; and see *Roberts v. Wiggins*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Haynes v. Bennett*, 53 Mich. 15, 17. Certainly the deed would be avoided by an equitable suit to cancel or set it aside on the ground that it was executed during infancy: *Harrod v. Myers*, 21 Ark. 592, 600; 76 Am. Dec. 409, 416; *Schaffer v. Lavretta*, 57 Ala. 14; *Bedinger v. Wharton*, 27 Gratt. 857; *Gillespie v. Bailey*, 12 W. Va. 70, 89; 29 Am. Rep. 445, 447; *Tumison v. Chamblin*, 88 Ill. 378.

An infant's release of a claim on account of personal injuries sustained by reason of the negligence of the releasee may be disaffirmed by bringing suit upon the original claim: *St. Louis etc. R'y v. Higgins*, 44 Ark. 293. So an infant may disaffirm a contract for work and labor by leaving the service before the time expires, and bringing an action upon a *quantum meruit*: *Moses v. Stevens*, 2 Pick. 332, 335; *Harney v. Owen*, 4 Blackf. 337; 30 Am. Dec. 662. But it is held that if an infant contributes certain property, under a partnership agreement, to the capital of the firm, his copartner acquires an interest therein which is subject to attachment, unless the agreement had been avoided, and that the infant, by claiming the property in replevin against the attaching officer, did not signify his election to avoid the partnership contract; there should have been some act of avoidance before the institution of the suit: *Betts v. Carroll*, 6 Mo. App. 518, — a questionable decision.

DISAFFIRMANCE BY PLEA OF INFANCY. — A plea of infancy to an action brought against an infant on his contract is obviously a sufficient disaffirmance, provided, of course, the contract has not already been ratified by him: *Strain v. Wright*, 7 Ga. 568; *Freeman v. Nichols*, 138 Mass. 313, 314; *Schrock v. Cronol*, 83 Ind. 243; *Sparr v. Florida Southern R'y*, 25 Fla. 185. In *Best v. Givens*, 3 B. Mon. 72, 74, it was, however, held that although a plea of infancy to an action on a note was a proper mode or step for avoiding the note, yet it was but an initiatory step, and did not *two facto* accomplish that end; for not only might the plea have been sufficiently answered by the replication and be defeated on the trial, but it might have been withdrawn at any time before judgment; and hence the defendant might, at any time before trial, confirm the note, notwithstanding the plea. The remedy by plea is, of course, only applicable in case of executory contracts, or where the question is presented in such a form that an opportunity to plead the infancy is presented: See *Bool v. Mize*, 17 Wend. 119, 132; 31 Am. Dec. 285, 291; *Inhabitants of Worcester v. Eaton*, 13 Mass. 371, 375; 7 Am. Dec. 155, 157.

DISAFFIRMANCE DURING MINORITY OF PERSONAL CONTRACTS, AND CONCERNING PERSONALTY. — An infant's personal contracts, and contracts relating to personal property, whether executory or executed, may be disaffirmed by him during his minority. It might seem, at first blush, that an infant has no more legal discretion to avoid a contract during his infancy than he has to enter into one, and that, therefore, he could not conclusively disaffirm

any contract until he reaches full age. But the protection of the infant is to be considered; and where this can the better be subserved by allowing him to avoid his contract during his infancy, he should be permitted to make the disaffirmance. And, as said in *Toule v. Dresser*, 73 Me. 252, "by reason of the transitory nature of personal property, to withhold this right from an infant until he became of age would, in many cases, be to make it utterly valueless." Accordingly he may avoid a sale or exchange of his chattels before reaching full age: *Stafford v. Roof*, 9 Cow. 626, reversing *Roaf v. Stafford*, 7 Cow. 179; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Shipman v. Horton*, 17 Conn. 481; *Bailey v. Barnberger*, 11 B. Mon. 113 (land-warrant); *Carpenter v. Carpenter*, 45 Ind. 142; *Toule v. Dresser*, 73 Me. 252; *Bloomington v. Chittenden*, 74 Mich. 698. In some of the earlier decisions, the rule is stated as though it were confined to the case where the property had been delivered. Thus in *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345, it was said: "If the subject of the sale be personal property, and a delivery to and possession by the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone beyond recovery, and in many cases for a very inadequate consideration." See also *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119; 31 Am. Dec. 285. We may inquire, What real difference does it make whether the property has been delivered or not? If he can rescind when there has been a delivery, why may he not rescind when there has been no delivery? Certainly the law would not require him to make a delivery, in order that he might be able to disaffirm. The more recent cases do not recognize the distinction. In *Stafford v. Roof*, 9 Cow. 626, it was held that where an infant sold a horse, but there was no evidence that he delivered it with his own hand, he might avoid the sale during infancy, and maintain trover against the vendee without demand, Jones, C., observing that there being no evidence of a manual delivery by the infant, the case stood at best "as the case of an infant contracting to sell, and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself." This decision is founded upon the erroneous notion that if an infant does not himself make a delivery of the property sold, the sale is void, because he could not appoint an agent to do it for him. We think that no demand was necessary in this case, nor in any other case of a sale which has been disaffirmed, in order that an action of trover can be maintained for the property; but, for the reason that when the sale is avoided, the contract is rendered void *ab initio*, and gives no protection against the action.

An infant's chattel mortgage may likewise be disaffirmed by him during minority: *State v. Plainted*, 43 N. H. 413; *Chapin v. Shafer*, 49 N. Y. 407; *Cagley v. Cushman*, 16 Minn. 397, 401; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407. So may his purchase of personal property: *Cagley v. Cushman*, 16 Minn. 397, 401; *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, 55; *Riley v. Mallory*, 33 Conn. 201. And these rules are not changed by section 2238 of the Iowa code, which provides that "a minor is bound, not only by contracts for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority," the statute only fixing a time within which contracts must be disaffirmed: *Childs v. Dobbins*, 55 Iowa, 205; *Leacock v. Griffith*, 76 Iowa, 89, 93. His contract of subscription for shares of stock in a corporation may also be repudiated during his nonage: *Newry etc.*

Ey v. Coombe, 3 Ex. 565; and see also *Indianapolis Chair Mfg. Co. v. Wess*, 59 Ind. 429.

An infant may also avoid his contract of partnership before he reaches his majority: *Adams v. Beall*, 67 Md. 53; 1 Am. St. Rep. 379; *contra*, *Dunton v. Brown*, 31 Mich. 182; and see *Armitage v. Widoe*, 36 Mich. 124, 130; or his contract of service: *Clark v. Goddard*, 39 Ala. 164, 171; 84 Am. Dec. 777, 780.

DISAFFIRMANCE DURING MINORITY OF DEEDS, LEASES, AND MORTGAGES.—An infant's conveyance of realty cannot be conclusively avoided by him until he reaches full age, although, it seems, he may enter during his minority, and enjoy the profits: *Zouch v. Parsons*, 3 Burr. 1794, 1806; *Stafford v. Roof*, 9 Cow. 626, 628; *Boal v. Miz*, 17 Wend. 119; 31 Am. Dec. 235; *Matthewson v. Johnson*, 1 Hoff. Ch. 560; *Cummings v. Powell*, 8 Tex. 80; *Kilgore v. Jordan*, 17 Tex. 341; *Chapman v. Chapman*, 13 Ind. 396; *Welch v. Bunce*, 83 Ind. 382; *Irvine v. Irvine*, 5 Minn. 61, 65; *Harrod v. Myers*, 21 Ark. 592, 600; 76 Am. Dec. 409, 416; *Doe ex dem. McCormick v. Leggett*, 8 Jones L. 425; *Hastings v. Dollarhide*, 24 Cal. 195; *McCarthy v. Nicrosi*, 72 Ala. 332, 335; 47 Am. Rep. 418, 420; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; and see code of Georgia (1882), sec. 2694; *Nathans v. Arkwright*, 66 Ga. 179; compare Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17. The reason which permits the infant to disaffirm his contracts of a personal nature, and those relating to personal property, during his minority, does not apply, at least under ordinary circumstances, to his deeds of conveyance. He is amply protected, while his infancy lasts, by his right to enter and take the profits. And it seems, also, that he may apply to a court of chancery for the appointment of a receiver, as the equivalent to such an entry: *Matthewson v. Johnson*, 1 Hoff. Ch. 560. In *Cummings v. Powell*, 8 Tex. 80, 91, Chief Justice Hemphill says: "Upon principle, it would seem that if an act of an infant be only voidable, and be binding upon the other party until it is avoided, that the act of disaffirmance must be by the infant himself on attaining mature age. That it can be avoided at all is owing to the want of legal discretion in the infant at the time of its execution; and this continues during his nonage and renders his affirmance or disaffirmance before majority of no avail." We may remark that this would undoubtedly always be so, were it not for the fact that his protection requires that he should be permitted to avoid certain of his contracts during his infancy.

The rule which denies the right of an infant to disaffirm his conveyance during minority is held not to be changed by a statute which provides that "when an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age"; for an infant has no right of action as to lands conveyed by him, simply on the ground of infancy, until the conveyance has been disaffirmed, and it cannot be disaffirmed until the infant has arrived at majority: *Welch v. Bunce*, 83 Ind. 382. According to the rule, the deed of an infant will not be held to be disaffirmed by his subsequent deed of the same land to another person, where there is no evidence that he was of full age when the second deed was executed, and the presumption that he was still an infant is not overcome by a considerable lapse of time between the conveyances: *Kilgore v. Jordan*, 17 Tex. 341; and in an action to cancel a deed executed during the infancy of the plaintiff, he should show affirmatively that he has attained his majority before the commencement of the action; there can be no implication in his favor as to his age from the fact that he has commenced an action in his own name; and the nature of the

relief he seeks requires him to show that he was a minor at the time of executing the deed, and the presumption is, that such condition continues until he negatives it: *Irvine v. Irvine*, 5 Minn. 61. If the deed of an infant be held to be absolutely void, as where it is executed without consideration, and therefore necessarily prejudicial to him under the rule of Lord Chief Justice Eyre, there would then seem to be no objection to a suit during his infancy to have it declared void: *Swafford v. Ferguson*, 3 Lea, 292; 31 Am. Rep. 639. It may be remarked that this case virtually stands alone among recent cases in its persistent adherence to a criterion long since exploded. In *Barker v. Wilson*, 4 Heisk. 268, it was held that where, by statute, a husband has an interest in the real estate of his wife, and it is necessary for the husband and wife to unite in a deed of her real estate, if the husband is an infant, he may, on coming of age, avoid the deed entirely; for "the husband having undertaken to do that to which he did not bind himself, and to defeat which he avails himself of his infancy, thereby destroying his consent to his own act, his exercise of the grant of his wife's permission to sell, wholly disengaging himself of the transaction, leaves the conveyance as if made by the wife alone."

In regard to leases made by infants, two of the judges in *Stator v. Trimble*, 14 Ir. C. L. 342, were of the opinion that the infant lessor could not, by any act of his during infancy, absolutely avoid the lease. We are of the belief, however, that the best interests and welfare of the infant should give him this right; and we may observe that he has, at all events, the right to enter and take the profits of the land while his infancy continues, and that such an act virtually ends a lease, which by its terms would expire at or before he attains his majority. If a lease be made to an infant, we have authority that it may be repudiated during infancy: *Blake v. Concannon*, 4 Ir. Rep. C. L. 323; see also *Kelsey's Case*, Oro. Jac. 320; *Fleener v. Dickerson*, 72 Ala. 318; and so far as these cases maintain this proposition, we think them unquestionably sound. It needs no argument to show that it may be highly advantageous for an infant lessee to avoid the lease during his minority, and escape liability for rent; and we think it ought not to be questioned that a plea of infancy is good in an action for rent or on any covenant contained in the lease: See *ante*, title "Leases." We do not see why the same observations should not apply where a deed of conveyance is made to an infant, so that he could, while still a minor, avoid the deed and recover back the purchase price paid, or defend an action for the price, if it has not been paid.

If an infant mortgages his real estate, we also think the ruling sound that he may avoid the mortgage during his minority, at least by pleading his infancy to a suit to foreclose: *Schneider v. Stalker*, 20 Mo. 269. "As in this instance," says the court, "the effect of the omission of the wife to plead her infancy would be to subject her estate to be sold under execution, by which an innocent purchaser might be injured, and as the proceeding is in the nature of an action to subject her estate to the payment of a debt, from analogy to the course in a suit on a contract by which an infant is jointly bound with others, we see no impropriety in permitting her to set up her infancy, though under age, in avoidance of this claim against her."

DISAFFIRMANCE OF CONTRACTS IN GENERAL WITHIN REASONABLE TIME AFTER REACHING FULL AGE. — While it is thus seen that certain contracts of an infant may be avoided by him during his minority, there is very little difference of opinion upon the proposition that it is never imperative that he should do so. The right to disaffirm a contract while his infancy continues is simply a privilege or option which the law allows him to exercise

for his protection, at his pleasure. There is nothing compulsory about it. To hold otherwise would be to say that he might ratify his contracts during his infancy; and to say that he might so ratify his contracts would be to say that his contracts were binding upon him. We know of no authority to the contrary except the cases of *Kelly v. Coote*, 5 Ir. C. L. 469, and *Blake v. Concannon*, 4 Ir. Rep. C. L. 323, which hold that an infant lessee, or an infant who acquires an estate on which rent has been reserved, must repudiate before the rent day comes, although he is still an infant, or he will be liable for the installment of rent; and we think the cases are clearly unsound: See *supra*, "Leases."

After an infant arrives at majority, there is no doubt about his power to repudiate as well as confirm his contracts made during minority. But it is a question involved in considerable confusion whether any or all of an infant's contracts not previously avoided must be disaffirmed by him within a reasonable or any particular time after he reaches full age; or in other words, whether his contracts may become binding upon him by the lapse of time, and no longer subject to disaffirmance. Much of this confusion has resulted from the application, or rather misapplication, of a *dictum* by Dallas, J., in *Holmes v. Blogg*, 8 Taunt. 35, 39, to the following effect: "I agree that in every instance of a contract voidable only by an infant on coming of age, the infant is bound to give notice of disaffirmance of such contract in reasonable time; and if the case before the court [the case of a lease to an infant] were that simple case, I should be disposed to hold that as the infant had not given express notice of disaffirmance within four months, he had not given notice of disaffirmance in reasonable time." There is certainly a distinction, which this quotation fails to make, between the different contracts which an infant may enter into with respect to his obligation to disaffirm within a reasonable time after he comes of age: See the classification made by Shepley, J., in *Boody v. McKenney*, 23 Me. 517, 523-526. And sometimes the distinction is said to be between his executory and his executed contracts. Thus, to illustrate the use of these terms, it is asserted that where the contract of an infant is executory, the infant must, to render him liable thereon, on arriving at full age, expressly ratify it; but where the act is executed, the infant must, on attaining full age, do some act to disaffirm the contract: *Law v. Long*, 41 Ind. 586, 596; *Scranton v. Stewart*, 52 Ind. 68, 92; and see *State ex rel. Petty v. Rousneau*, 94 N. C. 355, 361. "In other words," says Buskirk, J., in the first of these cases, "where the contract is executory, there must be an affirmation, to render the contract valid; and where it is executed, there must be a disaffirmance, to avoid the operation of the deed." What, we may stop to inquire, does the court mean by an "executory" contract? One that is promissory on both sides, or on the side of the infant, or of the other contracting party, or any or all of these? And what does it mean by an "executed" contract? It is very evident that such a rule is worse than useless because of its inaccurate use of legal language; and besides, it will be shown that giving the expressions any of the meanings suggested, the rule is not correct. Another good illustration of the careless use of words in this regard may be found in *Beardsley v. Hotchkiss*, 96 N. Y. 201, 211, where it is said: "As to contracts purely executory, it must be shown that the infant ratified them after he became of age, before they can be enforced against him. As to contracts executed, such as deeds of land or conveyances of personal property, they will generally be deemed ratified, and will thus become just as valid and effectual as the contracts of an adult, unless they be disaffirmed by the infant before he arrives

at age, or within a reasonable time thereafter." We will now consider the specific rules which have been established.

A purchase of personal property by an infant must be disaffirmed by him within a reasonable time after he reaches his majority, if he continues to hold the property, or the right of disaffirmance will be lost. Or to state the proposition in another form, the retention of personal property purchased during infancy by the infant, for an unreasonable time after coming of age, without any act of disaffirmance, amounts to a ratification of the contract. This is particularly true if the infant uses the property, or exercises other acts of ownership over it. The retention of the property for an unreasonable time after attaining full age is of itself inconsistent with any other idea than that of ownership, and hence of ratification: See *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Bail. Eq. 223; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; Georgia Code (1882), sec. 2731. And the evidence of ratification may be rendered still stronger by declarations, a sale of the property, and the like: See *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Bubanks v. Peak*, 2 Bail. L. 497; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Boody v. McKenney*, 23 Me. 517, 525; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 115; *Robinson v. Hoskins*, 14 Bush, 393; *Shropshire v. Burns*, 46 Ala. 108; *Minock v. Shortridge*, 21 Mich. 304; compare *Aldrich v. Grimes*, 10 N. H. 194, 198; *Counts v. Bates*, Harp. L. 464. An infant's contract of subscription for shares in a corporation must likewise be repudiated by him within a reasonable time after coming of age, or he will be bound by it: *Cork etc. Ry v. Cazenove*, 10 Q. B. 935; *Leeds etc. Ry v. Fearnley*, 4 Ex. 26; *Northwestern Ry v. McMichael*, 5 Ex. 114; *Dublin etc. Ry v. Black*, 8 Ex. 181.

If a minor purchases and takes a conveyance of real property, or makes an exchange of lands, or enters into an agreement to purchase lands, and goes into possession, he must, for like reasons, elect to disaffirm within a reasonable time after attaining full age, or he will be held to have ratified the transaction by his acquiescence. See *Cecil v. Cornes Salisbury*, 2 Vern. 225; *Roberts v. Wiggin*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Boody v. McKenney*, 23 Me. 517, 524; *Baker v. Kennett*, 54 Mo. 82; *Henry v. Root*, 33 N. Y. 526; *Walah v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; and see *Evelyn v. Chichester*, 3 Burr. 1717; *Armfield v. Tate*, 7 Ired. L. 258; *Middleton v. Hoge*, 5 Bush, 478; Georgia Code (1882), sec. 2731; compare *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358. The same is true respecting a settlement of boundaries: See *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. And if an infant takes a lease, he must also disaffirm within a reasonable time after reaching majority; and we should say, at all events, before rent day came: See *Boody v. McKenney*, 23 Me. 517, 524; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429; *McClure v. McClure*, 74 Ind. 108; *Mahon v. O'Farrell*, 10 Ir. L. R. 527 (the case of an infant assignee); and see *Ketsey's Case*, Cro. Jac. 320; but compare *Kelly v. Coote*, 5 Ir. C. L. 469; *Blake v. Concannon*, 4 Ir. Rep. O. L. 323, discussed *ante*, "Leases." In addition to a retention of the property, and a failure to disaffirm within a reasonable time after coming of age, the case may show a ratification by the infant's use of the property, or otherwise treating it as his own, or a ratification by a sale and conveyance of the property: See *post*, "Ratification by Sale or Conveyance of Property Purchased."

But, on the other hand, the mere retention by a minor, after coming of age, of either real or personal property purchased by him during his infancy, may be under such circumstances as not to indicate an intention to ratify the contract, as where he endeavors to rescind, or holds the property by virtue of a contract with some third person: See *House v. Alexander*, 105 Ind. 109; 65 Am. Rep. 189, 191; *Baker v. Kenneth*, 54 Mo. 82; *Scott v. Scott*, 29 S. C. 414; *Thing v. Libbey*, 16 Me. 55; *Smith v. Kelley*, 13 Met. 309; *Todd v. Clapp*, 118 Mass. 495; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27; and see *Dana v. Stearns*, 3 Oush. 372, 375; *Fleener v. Dickerson*, 72 Ala. 318; *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. These cases will be found discussed, post, under the title "Ratification by Retention of Property Purchased."

The retention of the consideration by the infant, for an unreasonable time after coming of age, without any expression of dissent, it is thus seen, ratifies the contract. It may be that this is what some of the cases call an "executed" contract, which requires a disaffirmance. What is a reasonable time, we should say, depends upon the circumstances of each case, and is, perhaps, a mixed question of fact and of law. If the infant has never received any consideration from the other contracting party, that is, if the contract is executory on both sides, or on the side of the opposite party, or if he has received the consideration, but has spent, wasted, or in any disposed of it during his minority, so that it no longer remains in his hands on attaining full age, the reason which requires him to disaffirm the contract within a reasonable time after coming of age, in order to avoid being bound, does not exist. It has therefore been held that an infant need not disaffirm his note, or a note and mortgage of his property, or any contract to pay money, after coming of age, in order to escape a ratification by inaction, to which, however, must be added the qualification, provided he does not retain the specific consideration: *Bumell v. Bennett*, 2 Cal. 101; *Mages v. Welsh*, 18 Cal. 155; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Baker v. Stone*, 136 Mass. 405; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336; and see *Crabtree v. May*, 1 B. Mon. 289. The same is true where he has sold or assigned his personal property: *Boody v. McKenney*, 23 Me. 517, 525; *Vaughan v. Parr*, 20 Ark. 600; *contra*, *Hastings v. Dollarhide*, 24 Cal. 195; *Summers v. Wilson*, 2 Cold. 469; or where he executes a chattel mortgage thereon: *Hill v. Nelms*, 86 Ala. 442; although acquiescence in the sale, assignment, or mortgage of property which has been delivered, if continued sufficiently long, might prevent his regaining the property, by virtue of the statute of limitations: See *Hill v. Nelms*, 86 Ala. 442; and perhaps his laches in avoiding the contract might result in a denial of equitable relief against it; certainly if continued for such a length of time as would bar an action for the recovery of the property: See *Merrweather's Adm'r v. Herran*, 8 B. Mon. 162. The contrary decisions of *Hastings v. Dollarhide*, 24 Cal. 195, and *Summers v. Wilson*, 2 Cold. 469, cannot be supported either by principle or by authority.

In Iowa, it is provided by section 2238 of the code that "a minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority." Unless, therefore, any contract whatever is disaffirmed within such reasonable time, it becomes binding, under this statute, both at law and in equity: *Stucker v. Yoder*, 33 Iowa, 177. What is a reasonable time within which the minor must disaffirm depends upon the circumstances of each case: *Jenkins v. Jenkins*, 12 Iowa, 195; *Stout v. Merrill*, 35 Iowa, 47; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 693. A disaffirmance on the eighteenth day after

attaining majority was held to be within a reasonable time, in *Jenkins v. Jenkins*, 12 Iowa, 195; and the same was held where the disaffirmance was on the thirty-second day: *Leacock v. Griffith*, 76 Iowa, 89, 95; but, on the other hand, a delay of two years was held to be unreasonable, in *Wright v. Germain*, 21 Iowa, 585; so with a delay of four months: *Stout v. Merrill*, 35 Iowa, 47; and of thirteen years: *Weaver v. Carpenter*, 42 Iowa, 343; of six months: *Jones v. Jones*, 46 Iowa, 466; *Hoover v. Kinsey Plough Co.*, 55 Iowa, 668; and of three years and eight months: *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696.

DISAFFIRMANCE OF DEEDS WITHIN REASONABLE TIME AFTER REACHING FULL AGE.—There has been more dispute on the question whether an infant must disaffirm his deeds of conveyance of his lands within a reasonable time after reaching full age than concerning the disaffirmance of his other contracts. According to one line of cases, he is required to avoid a deed of his lands within a reasonable time after attaining his majority, or he will be bound by his acquiescence: *Hastings v. Dollarhide*, 24 Cal. 195; *Kline v. Beebe*, 6 Conn. 494, 506; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Nathans v. Arkwright*, 66 Ga. 179; *Cole v. Pennoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; *Scranton v. Stewart*, 52 Ind. 68; *Long v. Williams*, 74 Ind. 115; *Wiley v. Wilson*, 77 Ind. 596; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Rep. 798; *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Laverty*, 19 Neb. 429; *Scott v. Buchanan*, 11 Humph. 468; *Matherson v. Davis*, 2 Cold. 443, 451; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; *Ferguson v. Houston etc. Ry*, 73 Tex. 344; *Askey v. Williams*, 74 Tex. 294; *Bigelow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 539; *Richardson v. Boright*, 9 Vt. 368; and see *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442. This is the rule in Iowa, by virtue of statute: See section 2238 of the code, and the cases cited under the last preceding head, particularly *Jenkins v. Jenkins*, 12 Iowa, 195; *Wright v. Germain*, 21 Iowa, 585; *Stout v. Merrill*, 35 Iowa, 47; *Weaver v. Carpenter*, 42 Iowa, 343; *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. Of course, under this view, lapse of time, taken in connection with other circumstances, as where the infant grantor, after reaching full age, retains the consideration, sees the land being improved by those who claim under his deed, and the like, will preclude him from thereafter disaffirming his deed, or in other words, will amount to a confirmation: *Kline v. Beebe*, 6 Conn. 494; *Wallace's Lessee v. Lewis*, 4 Harr. (Del.) 75; *Whenton v. Eust*, 5 Yerg. 41; 26 Am. Dec. 251; *Hartman v. Kendall*, 4 Ind. 403, 404; *Illey v. Padgett*, 27 S. C. 300; *Ferguson v. Houston etc. Ry*, 73 Tex. 344; compare *Doe ex dem. Moore v. Abernathy*, 7 Blackf. 442; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Richardson v. Pate*, 93 Ind. 423, 428; *Buchanan v. Hubbard*, 96 Ind. 1. In *Illey v. Padgett*, 27 S. C. 300, it was held that where an infant joined in the execution of a deed of a tract of land in which he held an interest in remainder, and the proceeds of the sale were in part invested in another tract, the title to which was partly taken in his name, and where he, after attaining his majority, lived on the land so purchased, and mortgaged his interest therein, and made no complaint for over fourteen years, and until the death of the life tenant, his deed was thereby confirmed. The court said: "It was very properly conceded in the argument that acquiescence for such a period of time would have been amply sufficient to make out a case of implied confirmation if there had

been no insuperable obstacle in the way of his avoiding the deed during the life of his mother"; yet it was held that the infant might have instituted an action to avoid the deed of his interest in remainder as soon as he attained his majority, notwithstanding he had no right to the possession of such interest until the death of the life tenant, and hence there was no such obstacle.

What is a reasonable time, under this view, depends upon the circumstances of the case, and, at all events, cannot exceed the period prescribed by the statute of limitations within which an action must be brought to recover the land. "What constitutes the reasonable time," says Morris, C., in *Sims v. Bardoner*, 86 Ind. 87, 91, 44 Am. Rep. 263, 266, "within which a person who has executed a deed during his infancy shall disaffirm it depends upon the particular circumstances of each case. The right must be exercised before the statute of limitations has become a bar to an action to recover the land conveyed, and it may be, under the circumstances of the particular case, that it should be exercised within a shorter period." Again, says Quinan, C., in *Bingham v. Barley*, 55 Tex. 281, 288, 40 Am. Rep. 801, 805, "What is a reasonable time is such a period as, in view of the attending facts, would rebut any presumption of an intended disaffirmance. The silence or non-claim of the minor for a considerable length of time, though less than the period of limitation for the recovery of lands, may as effectually prove his affirmance or ratification, in connection with the circumstances of the case, as his express acts or declarations to that effect."

In Illinois, a statute provides that a person who continues in the actual possession of lands or tenements under claim and color of title, made in good faith, for seven years, paying the taxes thereon, shall be the legal owner thereof, provided that when an adverse title shall be held by an infant, he shall commence an action to recover such lands or tenements within three years after the disability shall cease to exist. Under this statute it is held that the limit of reasonable time within which an infant must disaffirm his deed after reaching majority is three years: *Cole v. Pennoyer*, 14 Ill. 158; *Blankenship v. Stout*, 25 Ill. 132; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434; *Tunison v. Chamblin*, 88 Ill. 378; and it is held that the heirs of the infant grantor are to disaffirm within the same time that the infant might himself, if living: *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

It is sometimes held that the question as to what is a reasonable time is one of fact for the jury: *Wiley v. Wilson*, 77 Ind. 596; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Scott v. Buchanan*, 11 Humph. 468; but perhaps the better view is, that the question may be either for the court or for the jury: *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 472; 47 Am. Rep. 798, 801; compare *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Lavery*, 19 Neb. 429; and see the Iowa cases cited under the last preceding head. It is held in Iowa that an unreasonable delay is not excused by the fact that the infant was fraudulently induced to execute the deed under the belief that she was simply executing an instrument authorizing the sale of the land, and that she proceeded to disaffirm the deed as soon as she was informed of its existence, she being chargeable with negligence in making no effort to inform herself: *Weaver v. Carpenter*, 42 Iowa, 343; nor by the fact that the infant grantor was informed by persons, not qualified to give legal advice, that she could not disaffirm until her infant brother, who united with her in the deed, became of age: *Green v. Wilding*, 59 Iowa, 679; 44 Am. Rep. 696. And it is held in Illinois that mere forgetfulness of having made a deed, for twelve

years after attaining majority, furnished no excuse for the delay in disaffirming the deed made during minority: *Tunison v. Chamblin*, 88 Ill. 378; and that the marriage of an infant shortly after majority did not extend the time for avoiding her deed: *Keil v. Healey*, 84 Ill. 104; 25 Am. Rep. 434. And in *Long v. Williams*, 74 Ind. 115, it was held that the possession of real estate by a widow, under right of dower, was no excuse for the failure of a minor heir, to whom the fee belonged, to disaffirm a deed made thereof within a reasonable time after arriving at full age.

According to another line of cases, the mere silent acquiescence of an infant grantor, after coming of age, for any period of time less than that prescribed by the statute of limitations for a recovery of the land in the adverse possession of another, will not bar his right to avoid his deed, and consequently will not amount to a ratification: *Tucker v. Moreland*, 10 Pet. 59, 76; 1 Am. Lead. Cas. *224, *233; *Irvine v. Irvine*, 9 Wall. 617; *Sims v. Everhardt*, 102 U. S. 300; *Wells v. Seizas*, 24 Fed. Rep. 82; *Eureka Company v. Edwards*, 71 Ala. 248; *McCarthy v. Nicrosi*, 72 Ala. 332; 47 Am. Rep. 418, 420; *Kounts v. Davis*, 34 Ark. 590; *Stull v. Harris*, 51 Ark. 294; *Hoffert v. Miller*, 86 Ky. 572; *Boody v. McKenney*, 23 Me. 517, 523; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323, 330; *Peterson v. Laik*, 24 Mo. 541, 544; 69 Am. Dec. 441; *Huth v. Carondelet Marine Ry etc. Co.*, 56 Mo. 202; *Thomas v. Pullis*, 56 Mo. 211, 219; *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Voorhies v. Voorhies*, 24 Barb. 150, 153; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 327; *Drake's Lessee v. Ramsay*, 5 Ohio, 251; *Hughes v. Watson*, 10 Ohio, 127, 134; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Urban v. Grimes*, 2 Grant Cas. 96; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; and see and compare *Schaffer v. Lavretta*, 57 Ala. 14; *Bozeman v. Browning*, 31 Ark. 364; *Bagley v. Fletcher*, 44 Ark. 153; *Petty v. Roberts*, 7 Bush, 410; *Brantley v. Wolf*, 60 Miss. 420; *Jones v. Butler*, 30 Barb. 641; *Wilson v. Branch*, 77 Va. 65, 71, 72; 46 Am. Rep. 709, 712, 713. Although it is conceded that lapse of time, taken in connection with other circumstances, as retention of the consideration by the grantor after coming of age, standing by and seeing improvements made upon the land, and the like, may amount to a ratification or estop the grantor from avoiding the deed: *Irvine v. Irvine*, 9 Wall. 617, 627; *Davis v. Dudley*, 70 Me. 236; 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Wallace v. Latham*, 52 Miss. 291; *Allen v. Poole*, 54 Miss. 323, 330; *Thomas v. Pullis*, 56 Mo. 211, 219; *Drake's Lessee v. Ramsay*, 5 Ohio, 251, 254; *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Birch v. Linton*, 78 Va. 584; 49 Am. Rep. 381; *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445; compare *Youse v. Norcoms*, 12 Mo. 549, 563; 51 Am. Dec. 175. Under this principal rule it will be observed that the mere lapse of time raises a question, not of ratification, but of the statute of limitations. It follows, then, that although a time exceeding the statutory period has expired since the infant grantor became of age, yet if possession be not held under the deed for a sufficient length of time to constitute a bar, no obstacle exists, in the absence of acts or conduct on the part of the grantor creating an affirmation or estoppel, to his disregarding his deed and asserting a claim to the land: *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 445.

The reasons of these two opposing rules as to the effect of a lapse of time after the infant becomes of age remain to be examined. Concerning the first rule, which seems to be founded upon the dictum of Dallas, J., in *Holmes*

v. *Blogg*, 8 Taunt. 35, quoted under the preceding head, it is said by Chief Justice Prentiss, in *Bigelow v. Kinney*, 3 Vt. 353, 359, 21 Am. Dec. 589, 592: "A deed executed and delivered by an infant, conveying land, remains good and valid until it is avoided by him; and as he alone has the power of avoiding the deed and rescinding the contract, he is bound, in reason and justice, after he comes of age, and is competent to exercise a discretion upon the subject, to make his election, and give notice of his intention. He ought not to be allowed to leave the grantee, upon whom the contract is binding, in a state of suspense and uncertainty; and unless he makes known his determination in a reasonable time, it is just that the contract should become absolute against him"; and again, by Gilfillan, C. J., in *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 471, 47 Am. Rep. 798, 801: "The right of a minor to disaffirm, on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others, — with as much regard to those rights as is fairly consistent with due protection to the interests of the minor. In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection."

We may observe that this reasoning applies as well to any other contract which an infant may make as it does to his deed of conveyance; and therefore it would require, if logically followed out, that an infant, after coming of age, should repudiate, within a reasonable time, a sale or assignment of personal property, and even a promissory note, made by him during his infancy. This, however, is not the case. And the only sound reason why an infant is required to disaffirm his contract in any case within a reasonable time after arriving at full age is, that a ratification by the retention of the consideration may be inferred against him. No such inference can ordinarily be drawn where he sells and conveys his property, receiving, as he would usually do, a return in money. When it is said that the grantee should not be left in a state of suspense and uncertainty as to whether the grantor will avoid the deed or not, it may be replied that the grantee should not have dealt with an infant. We think that this line of cases does not give sufficient weight to the fact that although the infant's deed is good until avoided, it is nevertheless subject to an infirmity which, outside of the statute of limitations, only a ratification or an estoppel can cure; and it cannot be claimed that mere silence or acquiescence will amount to either. Furthermore, Chief Justice Gilfillan is not quite correct when he says that in every other case of a right to disaffirm, the party holding the right is required to disaffirm within a reasonable time. The case of a person *non compos* stands on the same footing as the case of an infant; and a personal disability of this sort is entirely different from an infirmity, such as fraud, in the contract merely. We think, therefore, that the second rule is supported by the better reason, as it certainly is by the weight of authority. It is not, however, to be sustained, as suggested in some of the cases, for example, *Boody v. McKenney*, 23 Me. 517, 523, because the grantor, by his silent acquiescence, "occasions no injury to other persons, and secures no benefits or new rights to himself"; for his failure to disaffirm may, and perhaps often will, operate as an injury, but because mere acquiescence does not amount to either an affirmation or an estoppel.

There is, of course, in any view, as already seen, a distinction, as to disaffirmance, between the case where an infant conveys his lands, and where lands are conveyed to him; and to say, as was said in *Hastings v. Dollarhide*, 24 Cal. 195, 216, that "on principle, we can see no distinction between the case of an infant grantor and the case of an infant grantee justifying a distinction between them. If the infant, on attaining majority, is bound by the rule of diligence in the one relation, then he must be in the other,"—is to confess one's self as being unable to appreciate clear and sound legal differences: See *supra*, the preceding title.

DISAFFIRMANCE OF DEEDS OF INFANT FEMAES COVERT AFTER REACHING FULL AGE.—The question just considered of the obligation of a grantor to disaffirm a deed of conveyance executed during infancy within a reasonable time after reaching full age, may be complicated by the fact that the grantor is laboring under the disability of coverture as well as that of infancy. It is the settled rule, wherever coverture at the time a cause of action accrues is a disability, so that the *feme covert* is not required to sue, although she may be permitted to sue, and so that the statute of limitations will not run against her, that an infant *feme covert* who executes a deed of her lands according to the statutory requirements will not be precluded from disaffirming the deed by her mere omission for any length of time to disaffirm it, after she attains her majority, while her coverture continues. *A fortiori* would she not be barred of her right to disaffirm the deed by any mere lapse of time during the existence of the coverture, if the husband, who united in the deed, acquired by virtue of the marriage an estate by the curtesy in the wife's lands, or at all events, a right to take their rents and profits during his lifetime; for the deed would convey the husband's interest, and hence the grantee would have a right to the possession and profits of the lands while that interest continued, or in other words, during the coverture, and the wife would consequently be powerless to disaffirm the deed during that time, or, at least, any disaffirmance would be a vain act: See *Sims v. Everhardt*, 102 U. S. 300; *Miles v. Lingerman*, 24 Ind. 385; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100, 108; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; *Temple v. Hawley*, 1 Sand. Ch. 153; *McIlwaine v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429; *Scott v. Buchanan*, 11 Humph. 468; *Matherson v. Davis*, 2 Cold. 443, 451; *Youse v. Norcoma*, 12 Mo. 549, 563; 51 Am. Dec. 175; *Bedinger v. Wharton*, 27 Gratt. 857; *Wilson v. Branch*, 77 Va. 65; 46 Am. Rep. 709; *Darraugh v. Blackford*, 84 Va. 509; *Stull v. Harris*, 51 Ark. 294; *Epps v. Flowers*, 101 N. C. 158; and see *Vaughan v. Parr*, 20 Ark. 600 (sale of an interest in remainder in a slave); *Magee v. Welsh*, 18 Cal. 155 (execution of a note and mortgage); compare *Craig v. Van Bebber*, 100 Mo. 584, — the principal case.

It was, however, asserted in *Scranton v. Stewart*, 52 Ind. 68, 92, that an infant *feme covert* is required to disaffirm a deed of her lands by some such act as notice within a reasonable time after coming of age, notwithstanding her coverture, and notwithstanding coverture at the time a cause of action accrues prevents the running of the statute of limitations, so that while she continued married she would not be required to bring an action concerning the property; the court saying that there was a "well-defined distinction between laying the foundation to bring an action, and the actual bringing of the action"; but this dictum was disapproved in *Sims v. Everhardt*, 102 U. S. 300, 307, a case which arose from Indiana, and by a number of Indiana cases: *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100, 108; *Sims v. Bardoner*, 86 Ind. 87, 96; 44 Am. Rep. 263, 270; *Richardson v. Pate*, 93 Ind. 423, 426;

47 Am. Rep. 374, 376. The case, therefore, is not law upon this point; and it is difficult to see how any such view could be sustained, where the common-law rights of the husband in the lands of his wife exist, and he joins in the conveyance, since it is very questionable whether she could disaffirm by any act, and even if she could, she could not, of course, recover possession of the land as long as the coverture lasted, and the disaffirmance would be in reality an idle act: See *Sims v. Everhardt*, 102 U. S. 300, 307. Nevertheless it has been held, under such circumstances, that while she would not be obliged to disaffirm during her coverture, she might do so if she pleased, and maintain an action to quiet her title to the land, although she would not be entitled to its possession: *Sims v. Smith*, 86 Ind. 577; *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; and see *Thley v. Padgett*, 27 S. C. 300. If coverture is a disability which will prevent the running of the statute of limitations, but if, notwithstanding, a married woman is permitted to sue concerning her lands independently of her husband, and the common law concerning the marital rights of the husband does not exist, then it would seem she might disaffirm her deed, executed while an infant, during the existence of the coverture, although she would not be obliged to do so: See *Buchanan v. Hubbard*, 96 Ind. 1; 119 Ind. 187, 193; and see *McLeane v. Kadel*, 30 How. Pr. 193; 3 Rob. (N. Y.) 429.

If it be true that an infant *feme covert* will not be prevented from disaffirming a deed of conveyance of her own lands by any mere lapse of time while the disability of coverture lasts, we should say that it would certainly be true that the lapse of time would not bar her right to disaffirm a deed by which she released her dower in the lands of her husband, since she would have no right to avoid her release by claiming dower during the lifetime of her husband: *McMorris v. Webb*, 17 S. C. 558; 43 Am. Rep. 629; and see *Sanford v. McLean*, 3 Paige, 117, 122; 23 Am. Dec. 773, 775; *Richardson v. Pate*, 93 Ind. 423; 47 Am. Rep. 374.

It was held, in a state where curtesy exists, that where an infant *feme covert* and her husband executed a deed of her lands, and the wife died after coming of age, leaving her husband and two minor children surviving her, as the husband could not sue, since the deed was binding upon him as to his estate by the curtesy, and as the wife could not sue alone, the statute of limitations never began to run against the wife during her lifetime, and consequently did not begin to run against her children, who continued to be infants, so as to bar their claim to the land; and besides, since upon the death of the wife the grantee became invested with an estate for the life of the husband, the statute would not begin to run against the heirs of the wife until the termination of the life estate, as well as the removal of their disabilities: *Matherson v. Davis*, 2 Cold. 443, 449, 450; and see, to the same effect, *Harris v. Ross*, 86 Mo. 89; 56 Am. Rep. 411.

Lapse of time, taken in connection with other circumstances, may possibly preclude a *feme covert* from repudiating a deed of her lands, executed during infancy. But where a female infant, residing in one state, executed there a deed of lands in another state, and afterwards married, but it did not appear whether before or after her majority, nor where she and her husband resided after the execution of the deed, nor that the husband acquiesced in the deed after he knew of it, it was held that the lapse of about five years after the wife's majority, without any attempt to disaffirm the deed, did not, under the circumstances, prevent the husband and wife from disaffirming it: *Doz ex dem. Moore v. Abernathy*, 7 Blackf. 442; and that the silence and inaction of an infant *feme covert* for thirty years after the execution of a deed of her

lands by herself and husband, and for more than twenty-six years after she attained her majority, coupled with the fact that she lived in the city where the lands were situated, and was probably aware that valuable improvements were being made, did not amount to an affirmation of the deed: *Youse v. Norcome*, 12 Mo. 549, 563; 51 Am. Dec. 175; and again, that a disaffirmance by an infant *feme covert* of a deed of her lands, executed by herself and husband, thirty-three years after she attained her majority, was within a reasonable time, where she continued under coverture, and where the husband had received the entire consideration of the lands, and she was under his control, and he refused to permit her to disaffirm the deed until shortly before the commencement of the suit in question to quiet her title against the heir of her grantee in possession: *Sims v. Bardoner*, 86 Ind. 87; 44 Am. Rep. 263; also, that an infant *feme covert*, who unites with her husband in a conveyance of his lands, was not estopped from disaffirming the deed after her husband's death, and claiming her interest in the lands as widow, by the fact that the grantee, or his successors, have, with her knowledge, made valuable improvements upon the lands, if such improvements were made prior to her husband's death: *Richardson v. Pate*, 93 Ind. 423, 428; and it is further held, in *Buchanan v. Hubbard*, 96 Ind. 1, that a married woman was not estopped from disaffirming, during coverture, a deed of her own lands, executed during infancy, from the fact that the grantee, with her knowledge, after reaching majority, made improvements upon the lands; and also that the fact that she united with her husband in enjoying or exercising dominion over property received by the husband as part of the consideration did not preclude her from asserting the disability of infancy against the grantee, or his successors. But, on the other hand, where a female infant joined in a conveyance of her husband's lands, and for thirteen years after she attained her majority, and her husband's death, lived in the vicinity of the lands, which were being greatly improved by the grantee, it was held that she was thereby precluded from avoiding her deed, and claiming dower in the lands: *Hartman v. Kendall*, 4 Ind. 403, 404.

The time within which the grantor must disaffirm her deed executed during infancy, after the disability of coverture is removed, we should say, in accordance with our views expressed under the last preceding head, would properly be fixed by the statute of limitations, which begins to run at the removal of the disability, and that her right to disaffirm would not be barred until barred by the statute. Some of the foregoing cases seem, however, to hold that she must disaffirm within a reasonable time after becoming discoverd. The question does not appear to be distinctly discussed in any case.

CONSEQUENCES OF DISAFFIRMANCE.—CONTRACT IS RENDERED VOID AB INITIO.—The disaffirmance of a contract by a minor annuls or renders it void on both sides *ab initio*: *Boyden v. Boyden*, 9 Met. 519, 521; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209; *French v. McAndrew*, 61 Miss. 187; *Schrock v. Crowl*, 83 Ind. 243; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, 55; *Hoyt v. Wilkinson*, 57 Vt. 404. Therefore, if an infant sells a tract of land and executes a title bond, and on coming of age sells the land to another person, and executes to him a title bond, the effect of the disaffirmance of the first contract by the second is to extinguish from the beginning any interest at law or in equity which the first vendee may have acquired under the contract, and hence he gets no priority over the second vendee by obtaining a deed of the land from the vendor after such disaffirmance, especially if the first vendee had not paid full value, and had taken the deed with notice of the second contract: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76

Am. Dec. 209; and if a grantor disaffirms a deed executed during infancy, the conveyance being rendered void *ab initio*, he is entitled to charge the grantee for rents during the entire time that he occupied the land, claiming under the deed: *French v. McAndrew*, 61 Miss. 187.

INFANT'S RIGHTS, IN GENERAL, ON DISAFFIRMANCE OF CONTRACT.—Where the contract of an infant effects a transfer of his property, his rights on disaffirming the contract are clear. If his real estate is sold and possession delivered, the title is revested in him by the disaffirmance, and he can, without any doubt, recover the land, if it is still in the hands of the party who contracted with him, and if it has been transferred, even to a *bona fide* purchaser for value, he may, as above seen, still recover it. If he sells his real property, but has retained possession, no affirmative action on his part is, of course, required. If he sells and delivers his personal property, the title is likewise revested in him on disaffirming the contract, and he is entitled to the property in whosoever hands it may be, and may retake the same, and may maintain an action of replevin or trover for it: See *Shipman v. Horton*, 17 Conn. 481; *Bailey v. Barnberger*, 11 B. Mon. 113; *Towle v. Dresser*, 73 Me. 252; *Bloomingtondale v. Chittenden*, 74 Mich. 698. And therefore no action of trespass can be sustained against him for taking the property into his possession: *Shipman v. Horton*, 17 Conn. 481. We doubt, also, if any demand would, on principle, ever be a necessary prerequisite to maintaining replevin or trover for the property, the contract being rendered void *ab initio* by the rescission: But see *contra*, *Stafford v. Roof*, 9 Cow. 626; *Cogley v. Cushman*, 16 Minn. 397; *Betts v. Carroll*, 6 Mo. App. 518. Of course, the repudiation of a sale of personal property will not vest in the infant a title to goods which he never owned, but which were purchased by the vendee from the avails of the property sold to him by the infant: *Shipman v. Horton*, 17 Conn. 481. The foregoing propositions suppose that the infant has not, on or after the disaffirmance, transferred the property, real or personal, to some other person. If such a transfer is made, we should say, however, that the transferee stands in the shoes of the infant, so far as a recovery of the property may be concerned.

An infant who has mortgaged his crops to secure advances cannot be indicted for afterwards disposing of the crops, since the contract of mortgage, when disaffirmed by the subsequent disposition, became absolutely void, and the infant could not be held amenable to the criminal law for the violation of a void contract: *State v. Howard*, 88 N. C. 650. In *McCarthy v. Nicross*, 72 Ala. 332, 47 Am. Rep. 418, it was held that where a sewer was constructed through the defendant's lot, at the joint expense of himself and plaintiff, who owned the adjoining upper lot, under a written agreement entered into while defendant was an infant, the latter's disaffirmance of the contract operated as a revocation of the easement created by it, and the plaintiff's continued use of the sewer thereafter would be a nuisance, which the defendant might abate by obstructing the sewer.

If an infant purchases a chattel, and gives his promissory note for the price, his disaffirmance of the contract operates to divest the payee of his title to the note, and to reinvest him with the title to the chattel, so that no action can be maintained on the note against the infant, either by the payee or his subsequent transferee: *Hoyt v. Wilkinson*, 57 Vt. 404. An infant indorser of a note may disaffirm his indorsement and intercept payment to the indorsee: *Hastings v. Dollarhide*, 24 Cal. 195; and may even disaffirm the transfer, and recover of the maker, notwithstanding the maker paid the paper to the transferee before the infant's disaffirmance of the assignment: *Briggs v. Mo-*

Cabe, 27 Ind. 327; 89 Am. Dec. 503, 506; *contra*, *Welch v. Welch*, 103 Mass. 562; and see *supra*, "Bills and Notes." And where the payee of a non-negotiable note, who was a minor, exchanged it with a third person for a watch, but on the next day tendered back the watch and demanded the note, which was refused, and the maker of the note, being informed of the transaction, gave a new note for the debt, it was held that there could be no recovery against the maker on the first note by a subsequent transferee, since when the assignment of the note was rescinded by the minor the note ceased to be the property of the assignee, and the maker had then the right to consider it as still the property of the minor, and he became discharged from liability thereon when he gave the new note in lien thereof: *Willis v. Twambly*, 13 Mass. 204.

If, also, an infant makes a special contract to labor, on disaffirming the contract he may recover on a *quantum meruit* for the services performed, as though no special contract had been made, and, furthermore, the damages sustained by the employer by reason of the infant's abandoning the contract, or otherwise failing to comply with its terms, cannot be taken into consideration in the action by the infant: See *supra*, "Service."

INFANT'S RIGHT TO RECOVER BACK MONEY PAID BY HIM ON DISAFFIRMANCE. — The right of an infant to recover back money paid by him on disaffirming his contract is a question about which there has been a good deal of difference of opinion. The notion that he cannot recover seems to be founded on a reported *dictum* of Lord Mansfield in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, as follows: "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again." This *dictum* was approved by Chief Justice Gibbs in the much-discussed case of *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and the rule announced that an infant who pays money on a valuable consideration could not recover the money back, after having partially enjoyed the consideration; and therefore an infant who took a lease of a house, occupied the premises for a time, and paid the rent, could not recover back the rent so paid, on avoiding the lease and quitting the premises. And in *Wilson v. Kearee*, Peake Add. Cas. 196, Lord Kenyon held, *at nisi prius*, that though an infant who had entered into a contract to purchase the good-will and stock of a public house could not be compelled to complete it, yet he could not, on refusing to go on with the contract, maintain an action to recover back a deposit which he had paid. In *Corpe v. Overton*, 10 Bing. 252, 3 Moore & S. 738, the next case which presented the question, it was decided that an infant who agreed to enter into a partnership with a tradesman, and who paid a deposit towards the purchase of an interest in the business, which was to be forfeited to the tradesman if the infant failed to fulfill the agreement, might rescind the agreement, and recover back the money so paid by him. The court did not, in terms, purport to overrule *Holmes v. Blogg*, 8 Taunt. 503, 2 Moore, 552, but distinguished it on the ground that in it the infant had received something of value for the money he had paid, and could not put the defendant in the same position as before, while in the case before the court the infant had derived no benefit from the transaction, and, besides, was subjected to a penalty.

In *Ex parte Taylor*, 8 De Gex, M. & G. 254, an infant paid, by means of borrowed money, a premium upon entering into a partnership, and before he became of age disaffirmed the contract of partnership. The court went back to *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and *Wilson v. Kearee*, Peake Add. Cas. 196, and held that the infant could not have recovered back the

premium had his partners remained solvent, and therefore could not prove for it under their bankruptcy; Lord Justice Turner saying: "It is clear that an infant cannot be absolutely bound by a contract entered into during his minority. He must have a right, upon his attaining his majority, to elect whether he will adopt the contract or not. It is, however, a different question whether, if an infant pays money on the footing of a contract, he can afterwards recover it back"; and concluding with the language of Lord Kenyon in *Wilson v. Kearse*, Peake Add. Cas. 198: "If an infant buys an article which is not a necessary, he cannot be compelled to pay for it; but if he does pay for it during his minority, he cannot, on attaining his majority, recover the money back." Finally, in *Everett v. Wilkins*, 29 L. T. 848, the plaintiff, during his infancy, entered into an agreement with the defendant for the purchase of a one-half share in the defendant's public-house business. Under the agreement, the plaintiff was to pay an installment of the purchase-money at once, and the balance at a future uncertain time. The defendant was to provide board and lodging for the plaintiff and his wife, the plaintiff paying therefor, and the plaintiff was not to receive any of the fruits of the partnership until the balance of the purchase-money was paid. The plaintiff paid an installment, and went with his wife to board and lodge with the defendant, and shared in the management of the business, but afterwards, and before his majority, rescinded the agreement. It was held that the plaintiff might recover back the installment paid under the agreement, less the amount due for board and lodging [necessaries]. The case, it will be observed, is the same in principle as *Corpe v. Overton*, 10 Bing. 252; 3 Moore & S. 733. As to the right of an infant, under the Infants' Relief Act, 1874, 37 and 38 Victoria, chapter 62, to recover back money paid by him in pursuance of a contract made void by the act, see *Valentini v. Canali*, L. R. 24 Q. B. D. 166.

In this country, it has been held, on the authority of *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and Lord Mansfield's dictum in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, that where an infant does work and pays money on account of the purchase price of land, which was agreed to be conveyed to him in the future, he could not, by avoiding the contract, recover compensation for his labor, and get back the money paid; *McCoy v. Huffman*, 8 Cow. 84. But the case differs from *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, in that the infant never had the possession and enjoyment of the premises; and it is expressly disapproved, and so far, at least, as it denies the right of the infant to avoid his contract under which services were rendered, and recover the value of the services, is overruled in *Medbury v. Watrous*, 7 Hill, 110. See also *Weeks v. Leighton*, 5 N. H. 343; overruled in *Lufkin v. Mayall*, 25 N. H. 82. In several cases it has also been held, in conformity with *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, that where an infant puts money into a partnership business, or pays money in consideration of being admitted as a partner in a business, he cannot, after remaining a partner for a time, recover back the money so paid; *Moley v. Brine*, 120 Mass. 324; *Page v. Morse*, 128 Mass. 99; *Adams v. Beall*, 87 Md. 53; 1 Am. St. Rep. 379; and see *Breed v. Judd*, 1 Gray, 455; also see *supra*, "Partnership Agreements and Transactions." And in *Crummey v. Mills*, 40 Hun, 370, it was held that an infant could not, on coming of age, recover back money paid and stock deposited with brokers as a margin for the purchase of more stock, he having failed to keep his margin good, and his stock having been consequently all sold out, leaving him indebted to the brokers; the court saying: "No rule of law has ever permitted a minor to avoid a contract of which he has enjoyed the benefit, and recover back the

consideration paid on the attainment of his majority"; and also quoting 1 Parsons on Contracts, *322, to the effect that "if an infant advances money on a voidable contract which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money, unless it was obtained from him by fraud." But compare *Ruchisky v. De Haven*, 97 Pa. St. 202.

On the other hand, it is maintained that where the minor has received no benefit from the contract under which he has paid money, as where he has purchased property of which he never obtains the possession, he may, on repudiating the contract, recover back the money: *Robinson v. Weeks*, 56 Me. 102; *Shurtleff v. Millard*, 12 R. I. 272; 34 Am. Rep. 640; the court saying in the first of these cases: "There seems to be no good reason why, if lands conveyed and goods sold and delivered may be reclaimed by the infant, money paid should not be"; disapproving *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, and *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, and explaining the latter case; and in *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640, it was decided that the vendor was not entitled to deduct from the amount of money sued for the expense of advertising and selling the property again, brought about by the plaintiff's rescinding the contract. See also *Ruchisky v. De Haven*, 97 Pa. St. 202, where money was deposited by a minor with brokers as margins in stock speculations; and *Holt v. Holt*, 59 Me. 464, the case of a gift of money by an infant; but compare *Welch v. Welch*, 103 Mass. 562; *Brown v. Town of Canton*, 4 Lans. 409. And it has also been held that if an infant purchases property, he may recover back the price paid, if he restores or offers to restore the property to the vendor: *Riley v. Mallory*, 33 Conn. 201; *Cooper v. Alport*, 10 Daly, 352; *McCarthy v. Henderson*, 138 Mass. 310; *House v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189; and see *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; compare *Shirk v. Shultz*, 113 Ind. 571; although a restoration is not necessary if the property has been taken from him, either by the vendor or by some third person: *Whitcomb v. Joslyn*, 51 Vt. 79; 31 Am. Rep. 678; *Lesmon v. Beaman*, 45 Ohio St. 505; and in *McCarthy v. Henderson*, 138 Mass. 310, it was held that the vendors were not entitled to recoup for the use of the property while in the possession of the minor. It has been likewise decided that an infant might avoid an agreement of partnership, and recover back the money which he was induced to invest in the business, on restoring the benefits received from the partnership: *Sparman v. Keim*, 83 N. Y. 245; and in *Heath v. Stevens*, 48 N. H. 251, it was held that "An infant, upon rescinding an executed contract, may recover for what he has done or paid under it, provided he restore or account for what he has received under the contract"; and hence, where the defendant gave the plaintiff, who was then an infant, information respecting bounties paid for enlistment in New York, paid the plaintiff's fare to New York, and agreed to pay his fare back again if he was not accepted as a recruit, for which the plaintiff paid the defendant two hundred dollars out of his bounty, the plaintiff might rescind the contract and recover what he had paid under it, but in such an action the money advanced by the defendant to the plaintiff should be allowed the defendant, and it should be left to a jury to say what should be a further reasonable sum for the defendant to have on account of what he did and the risks he took.

In regard to the foregoing cases, it may be said, in the first place, that Lord Mansfield's dictum in *Earl of Buckinghamshire v. Drury*, 2 Eden, 60, 72, is unquestionably not law; and in the next place, we think that *Holmes v. Blogg*, 8 Taunt. 508, 2 Moore, 552, cannot be sustained. We think it per-

fectly clear that if the infant has received no benefit under the contract, he may, on disaffirming it, recover back any money which he may have paid; and we think it equally clear that the result is the same where the infant restores or offers to restore property obtained by him by virtue of the contract from the other contracting party; for, in the language of the court in *McCarthy v. Henderson*, 138 Mass. 310, "he is in the position of an infant who has paid money under a void contract and without consideration, and is entitled to recover it back." Furthermore, we think that the infant should be permitted to recover back the money paid by him without restoring or offering to restore property received under the contract which remains in his hands at the time, although such property, because of the disaffirmance of the contract, undoubtedly belongs to the other contracting party, who may retake it if he can, or maintain any appropriate action for it. If the infant has received a benefit under the contract of a nature like that in *Holmes v. Blogg*, 8 Taunt. 503, 2 Moore, 552, which cannot be restored, or if he has obtained property which he has consumed, destroyed, or in any way disposed of during his minority, so that it no longer remains in his hands, we do not see why, on principle, the infant may not still recover back the money paid. The notion that the opposite contracting party must be restored to his original condition before the infant can recover back the money paid is unsound. We do not see any difference in reason between the case where an infant parts with money and the case where he parts with property, and why he should not be able to recover the one under precisely the same conditions as the other. Where, however, what the infant has received under the contract has also been money, it may be that, to avoid circuity of action, a deduction of that sum should be made from the amount of the infant's recovery; and to this extent we think the foregoing case of *Heath v. Stevens*, 48 N. H. 251, is correct.

ADULT'S RIGHT TO RECOVER BACK CONSIDERATION FROM INFANT ON DISAFFIRMANCE.—Since the disaffirmance of a contract by an infant annuls or renders it void on both sides *ab initio*, it follows that the opposite contracting party has the right to reclaim any property transferred to the infant under the contract, and which may remain in the infant's hands. To hold that the infant might repudiate the contract, and still retain the property received by virtue of it, would be, in the language of Lord Mansfield in *Zouch v. Parsons*, 3 Burr. 1794, to make the privilege of infancy not a shield, but a sword. Hence if an infant disaffirms his purchase of personal property, the title reverts in the vendor, who may reclaim the property from the infant if it be still in his hands, or may maintain trover for its conversion, although, perhaps, he may have consumed, destroyed, or parted with the property after the avoidance of the contract: *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Boyden v. Boyden*, 9 Met. 519, 521; *Walker v. Davis*, 1 Gray, 506; *Strain v. Wright*, 7 Ga. 568; *Fitts v. Hall*, 9 N. H. 441; *Heath v. West*, 28 N. H. 101; *Skinner v. Maxwell*, 66 N. C. 45; *Carpenter v. Carpenter*, 45 Ind. 142; *Shirk v. Shultz*, 113 Ind. 571; *Nichol v. Steger*, 2 Tenn. Ch. 328; affirmed in 6 Lea, 393; *Bennett v. McLaughlin*, 13 Ill. App. 349; or the property may be attached at the suit of the creditors of the vendor: *Betts v. Carroll*, 6 Mo. App. 518. "We cannot sanction the doctrine contended for," says Warner, J., in *Strain v. Wright*, 7 Ga. 568, "that an infant who obtains property by virtue of a contract with an adult may, when of age, disaffirm such contract under the law made for his protection, and then refuse to restore the property thus obtained. The law, which was intended, in the language of the authorities, as a shield for the protection of the infant,

would be an instrument in his hands for offensive operations. It would enable him to act aggressively upon the rights of others, instead of enabling him to guard and protect his own rights."

This rule also unquestionably applies to a purchase of real estate by an infant which he afterwards disaffirms. And in case of a sale of real property by an infant, and we may add that the same must be true of a sale of personal property subsequently disaffirmed by him, the purchaser may likewise recover the consideration transferred to the infant, if the infant still retains it: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214; and see *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732. We do not see why this rule should not apply equally where the consideration is money, as where it is anything else, although it may be true that the identical money paid cannot be recovered. This, however, was denied in *Dill v. Bowen*, 54 Ind. 204; the court saying: "Having disaffirmed the contract, the law imposes upon her [the infant] no legal obligation to repay the purchase-money. This is implied in the proposition that she may disaffirm without restoring or offering to restore the purchase-money. If an infant disaffirm a contract after coming of age, he must do it *in toto*; that is to say, if he has property in his hands acquired by the contract, the other party may reclaim it. But if the property has passed from his hands, or if he has received money, the law imposes no obligation upon him to account for the property, or repay the money, upon his disaffirmance of the contract. It is not necessary that the other party should be placed *in statu quo*." We do not think that this confused and unreasoned statement can detract very much from what we have just said to the contrary. There is, notwithstanding, one truth which it recognizes, and which should be carefully borne in mind, namely, that where the infant has consumed, destroyed, or in any manner parted with the original consideration received by him, so that none of it remains in kind in his hands, he is under no obligation to repay its value or restore an equivalent: See *Nichol v. Steger*, 2 Tenn. Ch. 328; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214; and if property received by the infant is in his hands in an injured condition, he is not liable for the injury, unless, perhaps, under some circumstances, in an action of tort: See *Carpenter v. Carpenter*, 45 Ind. 142.

INFANT'S OBLIGATION TO RESTORE CONSIDERATION ON DISAFFIRMANCE. — The obligation of an infant to restore the consideration received by him as a condition precedent to the disaffirmance of his contract, or to his obtaining relief based upon such disaffirmance, is a question which has an intimate connection with the one just discussed, — of the right of the other contracting party to recover back the consideration parted with, from the infant, on the disaffirmance. That question supposed that the contract had been avoided, and that the adult was the actor. Here the infant is the actor, and is attempting to obtain some relief against his contract, based upon his privilege of infancy and his right to repudiate his agreements. It would seem to be plain that where the infant is sued upon his contract, he is under no conditions in asserting its invalidity on account of his infancy. As was well said in *Bureka Company v. Edwards*, 71 Ala. 248, 256, 46 Am. Rep. 314, 315: "Being voidable, and he making timely election to avoid by pleading his minority, his defense, if sustained by proof, will prevail. He need not tender back anything he may have acquired or received under the contract. The most that can be required of him is, that if he retained and held all or any part of what he had received under the contract until he reached the age of twenty-one [and we may add, before he reaches that age], then, on demand

or suit, he can be held to account for it"; and see also *West v. Gregg's Adm'r*, 1 Grant Cas. 53, 55. It will be noticed that the court is speaking, not of a suit to recover back from the minor the consideration parted with, but of a suit to enforce the contract against him.

It is difficult to see upon what theory of pleading or practice the infant could be required in such an action against him on the contract to restore the consideration, if he wished to take advantage of his infancy, unless a restoration of the consideration be a condition precedent to a disaffirmance, which is very seldom maintained. Yet in *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209, it was held that an infant who purchases goods for the purposes of trade, and does not return them, is liable for so much of the price as is equal to the benefit derived by him from the purchase; the court saying: "The true rule is, that the contract of an infant or lunatic, whether executed or executory, cannot be rescinded or avoided without restoring to the other party the consideration received, or allowing him to recover compensation for all the benefit conferred upon the party seeking to avoid the contract"; and in *Bartlett v. Bailey*, 59 N. H. 408, it was also said that "a person seeking to avoid his contract on the ground of infancy must account for what he has received under it by restoring or paying the value of whatever remains in specie within his control, and allowing for the benefit derived from whatever cannot be restored in specie. This doctrine has been repeatedly recognized in actions brought to recover what has been paid, or compensation for what has been done, under contracts made by infants. No reason exists why it is not equally applicable to cases where infancy is set up as a defense. Whether an infant is plaintiff or defendant in an action cannot affect his legal rights as to his contracts"; and it was therefore decided, where the plaintiff sold and delivered milk to the defendant, who was a minor engaged in the milk business, and who sold the milk to his customers, that the plaintiff was entitled to recover of the defendant the value of the benefit derived by him from the purchase of the milk. According to these New Hampshire cases, there does not seem to be very much real difference between an infant's general contracts and his contracts for necessities, as to his liability. It is almost needless to say that the position taken by them as to an infant being liable, at all events to the extent of the benefits received by him, is not correct on principle, nor is it sustained by the authorities. It seems also to be held by other cases that in an action against an infant on his contract, he must restore the consideration if he would disaffirm: *Dickerson v. Gordon*, 24 N. Y. St. Rep. 448; *Combs v. Hawes*, 8 Pac. Rep. 597 (decided under the California Civil Code).

The obligation of an infant to restore the consideration received by him under a contract which he claims to disaffirm, where he is a party plaintiff in an action founded on the disaffirmance, has been the subject of a good deal of difference of opinion, and there can hardly be said to be any well-defined rule. It has sometimes been held that a restoration of the consideration, or an offer to restore it, was a condition precedent to a disaffirmance by an infant of his contract, so that there could be no effectual avoidance unless this condition had been complied with: *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801; and these cases, which were legal actions, appear to disregard the inquiry whether the consideration still remains in the infant's hands or not; and see *Manning v. Johnson*, 26 Ala. 446; 62 Am. Dec. 732. It is safe to affirm that the authorities generally do not require the performance of any such condition to a disaffirmance; and although some of them may say that, under certain

circumstances, an infant cannot disaffirm his contract and maintain an action to recover back the property or money parted with, unless he restores or offers to restore the consideration, yet we take it that all that is meant is, that a restoration or an offer to restore is simply a condition to the obtaining of the relief sought, and not to the disaffirmance itself. Were the contrary true, a minor could not, at least where he retained the consideration, defend an action on his contract on the ground of infancy, unless he first made a restoration or an offer to restore, and an action brought by him, based upon a disaffirmance, would be premature, unless this step had been observed.

In opposition to this view, that a restoration of the consideration, or an offer to restore it, is a condition precedent to a disaffirmance, Wells, J., says, in *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117, 122, where the action was a writ of entry: "Another ground relied on by the defendant is, that the deed cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity that this right is maintained. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will divest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void, if at all, so that it will no longer protect him in the retention of the consideration. Or if he retain and use or dispose of such property after becoming of age, it may be held as an affirmation of the contract by which he acquired it, and thus deprive him of the right to avoid. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed in *statu quo*." See also, to the same effect, *Tucker v. Moreland*, 10 Pet. 58, 74; 1 Am. Lead. Cas. *224, *232; *Gibson v. Soper*, 6 Gray, 279, 282, 283; 66 Am. Dec. 414, 417 (lunatic's deed); *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565; *Pitchee v. Laycock*, 7 Ind. 398; *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233; *Corey v. Burton*, 32 Mich. 30; *Dawson v. Helmes*, 30 Minn. 107, 113; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; *Vullandingham v. Johnson*, 85 Ky. 238; and see *Bartlett v. Drake*, 100 Mass. 176, compare *Lemmon v. Beeman*, 45 Ohio St. 505.

It is very evident if no consideration was ever received by an infant, either because the other contracting party had not paid it over at all, or because it had been paid over to some one else, as the father or husband of the infant, that the infant may disaffirm the contract and recover back the money or property transferred, or obtain any appropriate relief, either at law or in equity, without restoring or offering to restore the consideration: *Griffie v. Younger*, 6 Ired. Eq. 520; 51 Am. Dec. 438; *Robinson v. Weeks*, 56 Me. 102; *Ruchisky v. De Haven*, 97 Pa. St. 202; *Clark v. Tate*, 7 Mont. 171; *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; *Vogelsang v. Null*, 67 Tex. 465; and see *Law v. Long*, 41 Ind. 586; *Richardson v. Pate*, 93 Ind. 423, 428. In *Vogelsang v. Null*, 67 Tex. 465, it was held that the fact the third party, who received the purchase-money for lands of the infant, and

failed to pay it over, was the recognised agent of the infant to receive it, was immaterial, since an infant could not appoint an agent to perform an act to his injury, although he might constitute an agent to do an act for his benefit, and whether the act was beneficial or injurious was left to the discretion of the infant. We think the decision correct, although the reason is absurd. It follows, from the foregoing, that where the infant transfers his property without any consideration whatever, that no obligation rests upon him to restore anything. Therefore it is unnecessary, in a bill to cancel a deed on the ground of the infancy of the grantor, for the complainant to offer to refund the purchase-money recited in the deed to have been paid, if he avers that the deed was procured without consideration: *Cook v. Toumba*, 36 Miss. 685; the infant is not bound by the recital of the consideration in the deed: *Cook v. Toumba*, 36 Miss. 685; but it is, of course, incumbent on the infant to establish, in such a case, that no consideration was in fact paid: *Wade v. Love*, 69 Tex. 522.

It has occasionally been broadly laid down in actions at law, brought by infants to recover money or property, based on their right to avoid their contracts, that an infant could not disaffirm his contract and recover back money paid or property transferred thereunder, without restoring or offering to restore the consideration received by him: *Taft v. Pike*, 14 Vt. 405; 39 Am. Dec. 228; *Farr v. Sumner*, 12 Vt. 28; 36 Am. Dec. 327; *Bailey v. Barnberger*, 11 B. Mon. 113, 115; *Bartholomew v. Finnemore*, 17 Barb. 428; and see *Bartlett v. Cowles*, 15 Gray, 445, which should be compared with *Gibson v. Soper*, 6 Gray, 279, 282, 283, 66 Am. Dec. 414, 417, and *Chandler v. Simmons*, 97 Mass. 508, 514, 93 Am. Dec. 117, 122, cited *supra*; also compare the more recent Vermont cases of *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194, and *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678, with the earlier ones above cited; also see *Green v. Green*, 69 N. Y. 553; 25 Am. Rep. 233. In *Bartholomew v. Finnemore*, 17 Barb. 428, an infant purchased a horse of the defendant, and paid for it in property. He kept the horse about a month, during which time, in consequence of his misuse of it, its value was greatly lessened, and then tendered it back to the defendant, and demanded the property he had delivered to the latter. It was held that he could not recover the property on a refusal to deliver it. Hand, P. J., said: "After he has enjoyed the benefit of it, in whole or in part, there is no equity in his avoiding his contract and reclaiming the property he delivered in exchange, without restoring the consideration, or at least an equivalent. This the plaintiff did not do nor offer to do in this case. He had the use of the horse for some time, and probably, by improper treatment, reduced him to one half of his former value, for all of which he offered no compensation." This theory that the infant must restore the consideration received by him, or if it cannot for any reason be restored, he is chargeable with an equivalent, or rather with its value, has been carried to its fullest extent in New Hampshire, as already seen: *Heath v. Stevens*, 48 N. H. 251; *Kimball v. Bruce*, 58 N. H. 327; *City Savings Bank v. Whittle*, 63 N. H. 587; also *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408, discussed *supra*; compare *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345.

In other cases at law, brought by infants, it has been said that an infant who would rescind his contract must restore or offer to restore the consideration, if it be in his hands; but his obligation with respect to a restoration does not exist if he has lost, consumed, destroyed, or in any way parted with the consideration during his minority: *Carr v. Clough*, 26 N. H. 280; 59 Am. Dec. 345; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 194; *Manning v. John-*

son, 26 Ala. 446; 62 Am. Dec. 732; *Green v. Green*, 69 N. Y. 553; 25 Am. Dec. 233; *Hangen v. Hackmeister*, 17 Jones & S. 34; *Miller v. Smith*, 26 Minn. 248; 37 Am. Rep. 407; *St. Louis etc. R'y v. Higgins*, 44 Ark. 293; *Bennett v. McLaughlin*, 13 Ill. App. 349; *Craig v. Van Bebber*, 100 Mo. 584; and see *Corey v. Burton*, 32 Mich. 30; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 340; 76 Am. Dec. 209, 214, per Moncure, J.; *Gillespie v. Bailey*, 12 W. Va. 70, 92; 29 Am. Rep. 445, 449; Chief Justice Church saying, in *Green v. Green*, 69 N. Y. 553, 25 Am. Dec. 233: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether." In *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678, an infant purchased a wagon, paying part of the purchase price, and giving his promissory note, secured by a lien on the wagon, for the remainder. The vendor afterwards took the wagon under his lien and sold it. It was held that as the vendor had retaken the wagon, there was nothing for the infant to do, to entitle him to recover the money paid by him towards the wagon, but to disaffirm the contract. And furthermore, that the infant's right of recovery was not affected by the fact that the wagon had depreciated in value while in his possession, by reason of use or otherwise, for he was "no more liable for the use of the wagon than for the agreed price." See also *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194, on the proposition that where an infant rescinds his contract of exchange offers to return the property received by him, and brings trover for his property, evidence that the property offered to be returned had depreciated in value is inadmissible, either for the purpose of defeating a recovery or reducing the damages. In *Lemmon v. Beeman*, 45 Ohio St. 505, it was held that where a minor purchased a stock of goods, he might disaffirm the purchase, and recover back the consideration paid, without restoring the goods, if they have been taken from him, whether rightfully or not, upon an execution against a third person. In such a case, he was not required, as a condition of his right to recover, to take any steps to regain the property taken from him. It was sufficient if it had ceased to be in his possession or subject to his control. Compare *Cresinger v. Welch's Lessee*, 15 Ohio, 156; 45 Am. Dec. 565.

There is still another line of cases taking the view that an infant may disaffirm his contract and recover back, in a court of law, property transferred, or money paid in pursuance thereof, without any condition as to restoring the consideration received by him: *Eureka Company v. Edwards*, 71 Ala. 248, 256; 46 Am. Rep. 314, 315; *Miles v. Lingerman*, 24 Ind. 385; *Briggs v. McCabe*, 27 Ind. 327; 89 Am. Dec. 503; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; *Shirk v. Shultz*, 113 Ind. 571; *Chandler v. Simmons*, 97 Mass. 508, 514; 93 Am. Dec. 117, 122; *Walsh v. Young*, 110 Mass. 396; *Dawson v. Helmes*, 30 Minn. 107, 113; *Shaw v. Boyd*, 5 Serg. & R. 309; and see *Shuford v. Alexander*, 74 Ga. 293; *Pitcher v. Laycock*, 7 Ind. 398; *Law v. Long*, 41 Ind. 536; *Richardson v. Pate*, 93 Ind. 423, 428; although if the infant still has the consideration in his hands, the opposite contracting party is of course entitled to recover it in an action brought therefor. It follows, it is no defense to an action by an infant to recover possession of a horse that another horse received by him in exchange therefor has been so misused by him that though sound and of equal

value with the horse given by him in exchange at the time of the transaction, it became unsound and of no value: *White v. Branch*, 51 Ind. 210. We think that the rule of these cases better accords with pleading and practice in actions at law than either of the others noticed above. Particularly is the rule to be condemned which compels the infant, if he cannot restore the original consideration received, to restore or offer to restore an equivalent, or to account for the benefits derived therefrom. To so hold would operate, in the language of Chief Justice Church in *Green v. Green*, quoted above, "as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether."

It seems to be regarded by some authorities that if a person applies to a court of equity for relief against his contract on the ground of infancy, he will be required to do equity by restoring the consideration to the other contracting party if he still retains it, or if not, by paying an equivalent: See *Hillyer v. Bennett*, 3 Edw. Ch. 222, 225; *Gray v. Lessington*, 2 Bosw. 257, 262; *Smith v. Evans*, 5 Humph. 70; *Manning v. Johnson*, 26 Ala. 446, 452; 62 Am. Dec. 732, 734; *Bryant v. Pottinger*, 6 Bush, 473; *Boezeman v. Browning*, 31 Ark. 364; *Cummings v. Powell*, 8 Tex. 80; *Folts v. Ferguson*, 77 Tex. 301; and see *Pitchee v. Laycock*, 7 Ind. 389. Thus, says the vice-chancellor in *Hillyer v. Bennett*, 3 Edw. Ch. 222, 225, "if after an infant comes of age he seeks to disaffirm and avoid his contract in a court of equity, and files his bill there for the purpose of obtaining its aid in restoring to himself the possession of the property he has parted with, a court of equity must deal with him as it would with any other adult party, and require him to do equity before he shall have equity done unto him. He must restore what he received when he parted with the property which he seeks to get back, especially if it appears that the other dealt with him in ignorance of the fact of nonage." And in *Gray v. Lessington*, 2 Bosw. 257, 262, it was held that an infant who goes into a court of equity to have her purchase of personal property rescinded, and her promissory notes and mortgage, given to secure a part of the purchase price, canceled, and the money paid by her returned, must do equity and restore the property, and make full satisfaction for the deterioration arising from its use. We do not think that so broad a rule can be sustained. The privilege of infancy should be recognized in equity to the same general extent as at law; and if the infant has in any way parted with the consideration during his minority, so that he no longer retains it, we do not think that equity should deny him relief unless he restores an equivalent. It seems to us that the maxim, "He who seeks equity must do equity," should not apply to such a case.

This latter is the view taken by other cases. If, therefore, an infant retains the consideration received from the other contracting party, equity may very properly require its restoration to the latter as a condition on which relief will be granted him in avoidance of his contract; but if the infant has lost, consumed, destroyed, or in any manner parted with the consideration during his minority, so that it no longer remains in his hands, his obligation with respect to a restoration is at an end: See *Eureka Company v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Reynolds v. McCurry*, 100 Ill. 356; *Brantley v. Wolf*, 60 Miss. 420; *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; and see *Gillespie v. Bailey*, 12 W. Va. 70; 29 Am. Rep. 145; *Braddon v. Brown*, 106 Ill. 519, and cases cited; and certainly there would be no obligation to restore, if the purchase-money for an infant's lands had been paid to her husband and retained by him: *Bedinger v. Wharton*, 27 Gratt. 857; *Stull v. Harris*, 51 Ark. 294; not even, it is held, where a large portion of it had been applied to the support of the infant and her family: *Bedinger*

v. *Wharton*, 27 Gratt. 357; and we should say that this principle would forcibly apply where an infant *feme covert* unites with her husband in a conveyance of his lands, in which she afterwards claims dower: See *Law v. Long*, 41 Ind. 586; *Richardson v. Pale*, 93 Ind. 423, 428. In *Weed v. Beebe*, 21 Vt. 493, it was held that where an infant, on coming of age, conveyed land purchased by him to a third person, who took with notice of the fact that a portion of the purchase price remained unpaid, the grantor might enforce his lien therefor in chancery without paying or offering to pay the amount already received by him; but here the infant had really ratified his purchase by the conveyance after majority.

If the suit is not brought by the infant himself, but by his subsequent grantee or purchaser, claiming that a prior conveyance or sale by the infant to the defendant had been disaffirmed, the question is presented, whether the same obligation to make a restoration of the consideration rests upon the plaintiff as would rest upon the infant had he sued instead. If it be held that a restoration or an offer to restore is a condition precedent to a disaffirmance, the defendant may of course show that this step had not been complied with: See *Kilgore v. Jordan*, 17 Tex. 341; *Stuart v. Baker*, 17 Tex. 417; *Bingham v. Barley*, 55 Tex. 281; 40 Am. Rep. 801. But where such a ruling does not obtain, we are inclined to think it a sound doctrine that if the infant is not a party to the suit, any claim which the defendant whose previous contract has been disaffirmed may have on account of the consideration is a personal claim against the infant, and cannot be enforced in the action: *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

In some of the states, the foregoing questions concerning the restoration of the consideration are controlled by statutes. Thus the following legislative attempt exists in California: "In all cases other than those specified in sections 36 and 37 [sections relating to contracts for necessities, and obligations entered into under the express authority or direction of statutes], the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent": Civ. Code, sec. 35. Section 17 of the Dakota Civil Code is the same in language, except that, instead of the words "or within a reasonable time afterwards," the section reads, "or within one year's time afterwards," and adds to the end of the section the words "with interest." It has been shown *supra*, "Statutory Regulation," that certain general contracts of infants under the age of eighteen are, in these states, absolutely void, while the others are voidable merely. So far as the foregoing section speaks of contracts made under the age of eighteen, it must have reference only to the latter, and not to those which are absolutely void, since these cannot be disaffirmed, in the proper sense of the word. It will be observed that the section says nothing about restoring the consideration when contracts made under the age of eighteen are disaffirmed, while it says that if the contracts are made by a minor over the age of eighteen, they may be disaffirmed "upon restoring the consideration to the party from whom it was received, or paying its equivalent." It would seem, therefore, that the disaffirmance by minors of contracts made under the age of eighteen is left to be governed by the general rules of the law upon the subject, and consequently no restoration or offer to restore should ever be required as a condition precedent to a dis-

affirmance, nor as a condition to obtaining relief in an action brought by the infant, except it be an equitable action, and only then when he has not parted with the consideration during his minority, but still retains it. But if a minor would disaffirm a contract made while he is over the age of eighteen, it appears to be a condition precedent to a disaffirmance that he should restore, or at least offer to restore, the consideration received by him, or pay its equivalent, and unless he observes this step, any attempted disaffirmance would be ineffectual. This seems to have been the view taken in *Combs v. Hawes*, 8 Pac. Rep. 597 (Cal.). There can be only one opinion about such a statutory distinction between contracts, and that is, that the distinction is extremely foolish, there being absolutely no reason whatever to justify its existence.

In Iowa, it is provided by section 2238 of the code that "a minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after attaining his majority." It has therefore been held, under this provision, that it is essential to the disaffirmance of a deed executed by the grantor during his minority that he return or tender the fruits received by him, if under his control: *Stout v. Merrill*, 35 Iowa, 47. The section, it is held, only requires the return of the identical money or property received by the minor, and not the payment of any other consideration, if that is gone: *Jenkins v. Jenkins*, 12 Iowa, 195; *Hawes v. Burlington etc. R'y*, 64 Iowa, 315; *Leacock v. Griffith*, 76 Iowa, 89, 94. "If," says the court in the last case, "he had disposed of the property, and squandered the money received from the other party, he may nevertheless avoid the contract."

In Indiana, it is enacted by a statute passed September 19, 1881, that "in all sales by an infant *feme covert* of lands belonging to her, and in which sale and conveyance her husband has joined, he being of full age, said infant shall not be permitted to disaffirm said sale until she shall first restore to the person owning said real estate the consideration she received for said land; provided, however, that if she will allege, in her complaint, that she received no consideration for said sale, an issue may be made upon such allegation; and if, upon the trial, the court or jury find that any consideration was received by her, the court shall, in the finding and decree, declare such amount so found a first lien against said land in favor of the defendant": 2 R. S. 1888, sec. 2944. And "in all sales of real estate by an infant, he or she shall not be permitted to disaffirm said sale without first restoring to the person owning the property sold the consideration received in said sale, if said infant falsely represented himself or herself to said purchaser to be over the age of twenty-one years, and the party buying from said infant acted in good faith, and relied upon said representations in such sale, and had good cause to believe said infant of full age": 2 R. S. 1888, sec. 2945.

DISAFFIRMANCE, WHETHER SUBJECT TO SUBSEQUENT AVOIDANCE. — It has been seen that an infant is permitted to disaffirm certain of his contracts during his minority, and the question is presented whether, after coming of age, he may avoid such disaffirmance. The opinion has been expressed in some English cases that he may do so: *Newry etc. R'y v. Coombe*, 3 Ex. 565; *Northwestern R'y v. McMichael*, 5 Ex. 114, 127. We think, however, that a disaffirmance once made by the infant, although during his minority, should be held binding upon him. This was so decided in *Edgerton v. Wolf*, 6 Gray, 453. If the disaffirmance takes place after the infant attains his majority,

it should unquestionably, especially where the rights of others intervene, be binding, and not subject to a subsequent recall: See *White v. Flora*, 2 Over. 423, 432; see also *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicross*, 72 Ala. 332; 47 Am. Rep. 418, 421. See a question of incomplete disaffirmance discussed in *Best v. Givens*, 3 B. Mon. 72, 74.

WHO MAY TAKE ADVANTAGE OF INFANCY. — It is a well-settled general rule that infancy is a personal privilege, of which no one is permitted to take advantage except the infant himself: *Coan v. Bowles*, 1 Show. 165, 171; *Grey v. Cooper*, 3 Doug. 65; *Shropshire v. Burns*, 46 Ala. 108; *Hastings v. Dollarhide*, 24 Cal. 195; *Frazier v. Massey*, 14 Ind. 382; *Schrock v. Crowl*, 83 Ind. 243; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161; *Hardy v. Waters*, 38 Me. 450; *Oliver v. Houdlet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Nightingale v. Withington*, 15 Mass. 272; 8 Am. Dec. 101; *Hill v. Keyes*, 10 Allen, 258, 260; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238; *Voorhees v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13; *Van Bramer v. Cooper*, 2 Johns. 279; *Hartness v. Thompson*, 5 Johns. 160; *Mason v. Denison*, 15 Wend. 64-66; *Parker v. Baker*, 1 Clarke Ch. 136; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Stocum v. Hooker*, 13 Barb. 536; *Jones v. Butler*, 30 Barb. 641; *Hesser v. Steiner*, 5 Watts & S. 476; *Kuns's Ex'rs v. Young*, 34 Pa. St. 60; *McGill v. Woodward*, 3 Brev. 401; *White v. Flora*, 2 Over. 423, 431; *Harris v. Musgrove*, 59 Tex. 401; *Wamsley v. Lindenberger*, 2 Rand. 478; Code of Georgia (1882), sec. 2732. This rule, which has been established from the earliest times, is utterly inconsistent with any other idea than that the contracts of infants are voidable merely, and not void. Being voidable only, it rests solely with the infant to say whether a contract made by him shall be binding or not.

It follows that a stranger to the contract cannot assert that it is not binding because entered into by an infant: *Keane v. Boycott*, 2 H. Black. 511, 515; *Douglas v. Watson*, 17 Com. B. 685, 691; 34 Eng. Law & Eq. 447, 551; *Baldwin v. Rosier*, 1 McCrary, 384; *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; *Ridgeley v. Orandall*, 4 Md. 435, 441; *Thompson v. Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Mansfield v. Gordon*, 144 Mass. 168; *Soper v. Fry*, 37 Mich. 236; *Holmes v. Rice*, 45 Mich. 142; *Griffith v. Schwendeman*, 27 Mo. 412; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Dominick v. Michael*, 4 Sand. 374, 418; *Ross v. Daniel*, 3 Brev. 438; *Lester v. Fraser*, 2 Hill Eq. 529; *Riley Eq. 76*. To illustrate: In an action against the defendant for enticing away the plaintiff's servant, the defendant was not permitted to allege that the contract of service was void because the servant was an infant: *Keane v. Boycott*, 2 H. Black. 511, 515; and in an action on a note executed to the trustees of a college for the purpose of an endowment fund, and payable on condition that a certain sum should be "secured" for that purpose prior to a date named, an answer by the defendant that a portion of the required sum was secured by notes executed by infants is insufficient: *Trustees of La Grange Collegiate Institute v. Anderson*, 63 Ind. 367; 30 Am. Rep. 224; so an action against the general owners of a ship, which had been chartered by an infant, for not delivering goods, cannot be maintained if the contract of charter has not been avoided by the infant: *Thompson v. Hamilton*, 12 Pick. 425; 23 Am. Dec. 619; again, it is no defense to an action of ejectment that the grantor, under whom the

plaintiff claimed, was an infant: *Babcock v. Doe ex dem. Bowman*, 8 Ind. 110; and in a suit to foreclose a mortgage, given to secure a promissory note, while the maker of the note may plead his infancy, a subsequent lien-holder cannot join in the defense: *Baldwin v. Rosier*, 1 McCrary, 384; and a conveyance, mortgage, assignment, or other transfer of property by an infant cannot be attacked as invalid because of infancy by his creditors: *Kendall v. Lawrence*, 22 Pick. 540; *McCarty v. Murray*, 3 Gray, 578; *Kingman v. Perkins*, 105 Mass. 111; *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38; *Lester v. Frazer*, 2 Hill Eq. 529; *Riley Eq.* 76.

Again, it follows that the adult party to the contract with the infant is bound, and cannot take advantage of the infancy: *Forrester's Case*, 1 Sid. 41; S. C., *sub nom. Gable v. Forester*, 1 Keb. 1; *Smith v. Bowen*, 1 Mod. 25; *Holt v. Ward Clarendieux*, 2 Strange, 937; *Warwick v. Bruce*, 6 Taunt. 118; affirming 2 Maule & S. 205; *Chicago etc. R. R. v. Lammert*, 19 Ill. App. 135, 140; *Johnson v. Rockwell*, 12 Ind. 76; *Beeson v. Carlton*, 13 Ind. 354; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Arnous v. Lesusier*, 10 La. 592; 29 Am. Dec. 470; *Oliver v. Houdlet*, 13 Mass. 237, 239; 7 Am. Dec. 134, 135; *Boyden v. Boyden*, 9 Met. 519, 521; *Stiff v. Keith*, 143 Mass. 224; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238; *Voorhees v. Wait*, 15 N. J. L. 343; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496; *Yates v. Lyon*, 61 N. Y. 344; *Crymes v. Day*, 1 Bail. L. 320; *Harris v. Musgrove*, 59 Tex. 401; and see Code of Georgia (1882), sec. 2732. Hence, as seen *ante*, "Contracts to Marry," while the mere promise to marry of an infant is not binding upon him, yet the adult party to the contract is bound, and therefore the infancy of the plaintiff is no defense to an action for breach of promise against the adult: *Holt v. Ward Clarendieux*, 2 Strange, 937; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; 10 Am. Dec. 709; *Hunt v. Peake*, 5 Cow. 475; 15 Am. Dec. 475; *Willard v. Stone*, 7 Cow. 22; 17 Am. Dec. 496. And if a person contracts with an infant to receive from him a conveyance of land, which he knows, at the time of contracting, will be executed before the infant shall have arrived at his majority, he cannot avail himself of that fact in defense to an action on a promissory note for the purchase-money: *Beeson v. Carlton*, 13 Ind. 354; and if personal property be sold to an infant, the fact that the vendor retains or afterwards comes into possession of the property as guardian of the infant will not authorize him to rescind the sale: *Crymes v. Day*, 1 Bail. L. 320; even a contract of bailment, made by the bailee with the agent of an undisclosed principal, who is a minor, cannot be rescinded by the bailee on the ground of the principal's minority: *Stiff v. Keith*, 143 Mass. 224. There is one apparent exception to this rule, that the adult party to a contract with an infant cannot take advantage of the infancy of the other party; namely, an infant cannot maintain a suit for the specific performance of his contract, because the remedy is not mutual, since the defendant could not have maintained the suit against the infant plaintiff: *Flight v. Bollond*, 4 Russ. 298; and see *Carrell v. Potter*, 23 Mich. 377; compare *Smith v. Smith*, 36 Ga. 184.

For the same reason, if a joint co-promisor is an infant, the promisee, in an action brought upon the contract, cannot consider the contract as void as to the infant, but must join him as a party defendant: *Wamsley v. Lindenberg*, 2 Rand. 478; *Slocum v. Hooker*, 13 Barb. 536. The cases of *Burgess v. Merrill*, 4 Taunt. 468, *Gibbs v. Merrill*, 3 Taunt. 307, 313, *Assignees of Hull v. Connolly*, 3 McCord, 6, 15 Am. Dec. 612, maintaining the contrary, cannot be sustained. And if a defendant, in an action upon a joint contract,

sets up his infancy as a defense, the plaintiff may enter a *nolle prosequi* or discontinue as to him, and proceed to judgment against the other defendants: *Hartness v. Thompson*, 5 Johns. 160; *Mason v. Denison*, 15 Wend. 64-66; *Woodward v. Newhall*, 1 Pick. 500; *Cole v. Pennell*, 2 Rand. 174, 179; *Cutts v. Gordon*, 13 Me. 474; *Kirby v. Cannon*, 9 Ind. 371; *Taylor v. Dansby*, 42 Mich. 82; or, of course, the plaintiff may try the question of infancy, and if found against him, may still have judgment against the other defendants: *Cutts v. Gordon*, 13 Me. 474. The opinion entertained by the *nisi prius* cases of *Chandler v. Parkes*, 3 Esp. 76, *Jaffray v. Frebain*, 5 Esp. 47, that this practice could not be followed, but that the plaintiff should discontinue the action, and commence a new action against the adult defendants only, has been repeatedly condemned, and is no longer the law.

An adult defendant likewise cannot plead the infancy of his co-promisor, or join with him in a plea of infancy: *Van Bramer v. Cooper*, 2 Johns. 279; *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13; and a joint plea of the infancy of one defendant being bad on demurrer as to the adult, is bad as to both: *Inhabitants of Bordentown v. Wallace*, 50 N. J. L. 13. So a firm of copartners cannot avail themselves of the exception to the rule that a party cannot rescind a contract and retain the consideration, existing in favor of infants, when they bring an action upon a policy of fire insurance after a settlement has been made with the company by an infant member of the firm: *Brown v. Hartford F. Ins. Co.*, 117 Mass. 479.

The rule that the infancy of the payee of a bill or note is no defense to an action on the paper by an indorsee or transferee against the acceptor, drawer, or maker may also be placed on the ground that the privilege of infancy is personal: *Grey v. Cooper*, 3 Doug. 65; *Taylor v. Croker*, 4 Esp. 187; *Nightingale v. Wilmington*, 15 Mass. 272; 8 Am. Dec. 101; *Dulity v. Brownfield*, 1 Pa. St. 497; *Hardy v. Waters*, 38 Me. 450; *Frazier v. Massey*, 14 Ind. 382; *Garner v. Cook*, 30 Ind. 331; *Hastings v. Dollarhide*, 24 Cal. 195. And to an action on a promise to pay the note or other obligation of another, the fact that the latter was an infant is no defense: *Hesser v. Steiner*, 5 Watts & S. 476; *Kun's Ex'r v. Young*, 34 Pa. St. 60; and an injunction to restrain proceedings at law on a note of an infant, indorsed by his father as security, given for the purchase of lands by the infant, issued on a bill filed by the infant to disaffirm the sale, will be dissolved as to the father: *Porter v. Baker*, 1 Clarke Ch. 136.

The foregoing general rule, that no one can take advantage of the infancy of a party to a contract except the infant himself, is subject to some limitations. Thus it is well settled that a privy in blood, or in other words, the heir of an infant, may, when interested, avoid the infant's contracts on the ground of his infancy, provided, of course, the right to avoid has not been lost: *Whittingham's Case*, 8 Coke, 42 b; *White v. Flora*, 2 Over. 426, 431; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Levering v. Heighe*, 2 Md. Ch. 81; 3 Md. Ch. 365; *Dominick v. Michael*, 4 Sand. 374, 418; *Hardy v. Waters*, 38 Me. 450; *Hill v. Keyes*, 10 Allen, 258, 260; *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315, 322; *Bozeman v. Browning*, 31 Ark. 364; *Veal v. Fortson*, 57 Tex. 482; *Austin v. Charlestown Female Seminary*, 8 Met. 196, 203; Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17. So, also, an infant's personal representatives may disaffirm his contracts: *Hussey v. Jewett*, 9 Mass. 100; *Hill v. Keyes*, 10 Allen, 258, 260; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Counts v. Bates*, Harp. L. 464; *Parsons v. Hill*, 8 Mo. 135; *Ferguson v. Bell's Adm'r*, 17 Mo. 347, 351; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burne*, 46

Ala. 108; *Hardy v. Waters*, 38 Me. 450; *Vaughan v. Parr*, 20 Ark. 600; *Bowman v. Browning*, 31 Ark. 364; *Tillingham v. Holbrook*, 7 R. I. 230, 243; *Hastings v. Dollarhide*, 24 Cal. 195; Cal. Civ. Code, sec. 35; Dak. Civ. Code, sec. 17.

But the guardian of an infant, it is held, cannot rescind the contracts of his ward: *Oliver v. Houdlet*, 13 Mass. 237; 7 Am. Dec. 134; *Crymes v. Day*, 1 Bail. L. 320; the court, in the first of these cases, saying: "The authority and interest of a guardian extend only to such things as may be for the benefit and advantage of the ward. If an infant makes a contract from which he derives a benefit, it cannot be avoided by his guardian; for this, being injurious to the infant, would be a violation of the guardian's duty." It was, however, decided in *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117, that the deed of conveyance of a minor may be avoided, after he becomes of age, by a guardian appointed over him as a spendthrift. "After the infant is of full age," says the court, "if unable to exercise his privilege, by reason of mental or legal incapacity, it seems reasonable, and consistent with the nature and purpose of this right, that it should be exercised for him, and in his name by the guardian who may have charge of his interests. Otherwise he might be remediless for most serious impositions, as he can do no legally valid act himself. The right may be asserted by heirs; and we cannot doubt that it may be, also, by a guardian appointed over his property for any cause for which adult persons are placed under guardianship." It has been also held that an assignee in insolvency cannot maintain a bill in equity to relieve the real estate of the insolvent from the encumbrance of a mortgage thereon, executed by the insolvent when a minor, and not ratified or disaffirmed by him after coming of age: *Mansfield v. Gordon*, 144 Mass. 168. "While the rights of an assignee," says Devens, J., "are not always tested by those of an individual creditor, there would seem to be no reason why larger rights in an estate conveyed by a minor are obtained by an assignee acting on behalf of all the creditors." An objection to the validity of a marriage settlement, on the ground that the parties to it were infants, cannot be made by the trustee acting under it, especially when a court of equity is asked to compel him to render an account: *Jones v. Butler*, 30 Barb. 641.

It has sometimes been said that privies in estate with an infant might also take advantage of the privilege of infancy: *White v. Flora*, 2 Over. 426, 431; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124, 127; *Beeler v. Bullitt*, 8 A. K. Marsh. 280; 13 Am. Dec. 161; *Domnick v. Michael*, 4 Sand. 374, 418; *Nelson v. Eaton*, 1 Redf. 498; but this dictum is erroneous: *Whittingham's Case*, 8 Coke, 42 b; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Bowman v. Browning*, 31 Ark. 364; the last case denying the right to avoid to the infant's devisees. It should, however, be carefully noted that after the infant has disaffirmed his contract, a privy in estate, or indeed any one whatever, may take advantage of such disaffirmance: *Jackson ex dem. Wallace v. Carpenter*, 11 Johns. 539; *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124, 127; *McGill v. Woodward*, 3 Brev. 401; *Williams v. Norris*, 2 Litt. 157; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; 19 Am. Dec. 71; *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 323; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Harris v. Cannon*, 6 Ga. 382. This is for the simple reason that when the contract has been avoided, it is as though it had never existed. One who claims to be the owner of property could therefore assert that a previous transfer of the property made during infancy by the person under whom he derives title had been disaffirmed by the latter. So sureties on the note of an infant given for the price of land purchased by him are not liable where

the infant disaffirms the contract after attaining majority, and restores the land to the grantor: *Baker v. Kennett*, 54 Mo. 82. And one to whom land has been conveyed, against which a mechanic's lien for materials furnished is sought to be enforced, may, after the grantor has disaffirmed the contract on the ground of infancy, avail himself of the disaffirmance in defense; and this, it is held, although the contract was disaffirmed by the grantor by a plea of infancy in the same action: *Price v. Jennings*, 62 Ind. 111. Also, where an infant mortgagor has, in a suit against him and his vendee to foreclose, pleaded his infancy, he thereby renders his mortgage void *ab initio*, and a separate answer by the vendee, alleging such infancy and avoidance, is good: *Shrock v. Crowl*, 83 Ind. 243. The right of avoidance, however, is not assignable: *Austin v. Charlestown Female Seminary*, 8 Met. 196, 203; and see *Armitage v. Widoe*, 36 Mich. 124.

RATIFICATION — WHAT CONTRACTS OF INFANTS MAY BE RATIFIED. — The ratification of a contract made during infancy necessarily presupposes that the contract was not absolutely binding, and, on the other hand, that it was no more than voidable. If the contract of an infant be, for any reason, void, very plainly there is nothing which can be ratified. Any so-called ratification could, at the most, be but a new contract, into which all the elements, including consideration, must enter. Those cases which hold an infant's contract, entered into by an agent, to be absolutely void, because an infant cannot appoint an agent, must, to be consistent, also hold the contract to be incapable of ratification, and such a ruling has sometimes actually been made: *Doe ex dem. Thomas v. Roberts*, 16 Mees. & W. 778, 781; *Trueblood v. Trueblood*, 8 Ind. 195; 65 Am. Dec. 756; *Wainwright v. Wilkinson*, 62 Md. 146; but see *supra*, "Delegation of Authority," and particularly the case of *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, in which the question of the ratification of a note executed by an agent of an infant was involved.

If any or all contracts of infants are made void by statute, then, of course, the contracts cannot be ratified. The Infants' Relief Act of England has already been noticed above, under the head "Statutory Regulation." By the second section of that act, it is provided that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." It has been held that this provision applies to ratifications made after the passage of the act of contracts entered into before that time: *Ex parte Kibble*, L. R. 10 Ch. 373; but that an action was maintainable by a *bona fide* indorsee for value, and without notice, against the acceptor of a bill of exchange, who accepted the bill after attaining twenty-one years of age, for a debt contracted during infancy, and after the passage of the act; although it seems that in such a case the acceptance would, as between the immediate parties to the bill, be a "promise or ratification," within the meaning of the section, upon which an action at the suit of the drawer would not lie: *Belfast Banking Co. v. Doherty*, 4 L. R. 1r. 124. It has also been held that this section applies to promises to marry: See *supra*, "Contracts to Marry"; and that therefore a ratification of such a promise, after the infant became of full age would not be binding, although a fresh promise would be: *Coxhead v. Mullis*, L. R. 3 C. P. D. 439; *Northcote v. Doughty*, L. R. 4 C. P. D. 385; *Dicham v. Worrall*, L. R. 5 C. P. D. 410. For cases and comments upon statutes of states of this country, see *supra*, "Statutory Regulation."

Independently of statute, and the few cases which stubbornly insist that certain contracts of infants are void at common law, the rule is, that the general contracts of an infant may be ratified by him after coming of age, and thus rendered no longer subject to his disaffirmance.

NATURE AND EFFECT OF RATIFICATION.—It has sometimes been said that if a person, after attaining his majority, ratifies a contract made by him during infancy, he takes upon himself a new liability founded upon an existing moral obligation: *Thornton v. Illingworth*, 2 Barn. & C. 824, 826; 4 Dowl. & R. 545; *Wilcox v. Roath*, 12 Conn. 550; *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; *Fetrow v. Wiseman*, 40 Ind. 148, 157. Thus, says Bayley, J., in *Thornton v. Illingworth*, 2 Barn. & C. 824, 825, "if he makes a promise, after he comes of age, that binds him, on the ground of his taking upon himself a new liability upon a moral consideration existing before, it does not make a legal debt from the time of making the bargain"; and in *Hodges v. Hunt*, 22 Barb. 150, 151, Paige, J., says: "Although most of the contracts of infants are now held to be voidable, and not absolutely void, yet, as they are not binding on the infant, a new promise does not impart to them any legal validity so as to enable the creditor to enforce them; but the new promise creates a new contract, founded upon and deriving its aliment from the old demand, upon which the creditor may sustain a suit against the infant." This theory seems to be a result of the old notion that many, if not most, contracts of infants are void, and is utterly unsound. The truth is, a ratification simply extinguishes the infirmity of infancy in the contract, so that the contract can no longer be disaffirmed. A ratification is not the creation of any new liability, but is merely the removal of an objection to an already existing and continuing liability. An infant's contract is binding upon him until disaffirmed, and when ratified it ceases to be the subject of avoidance. As was correctly said by McGowan, J., in *Ikley v. Padgett*, 27 S. C. 300, 302: "From its very nature, a thing only voidable needs no positive confirmation, but stands good until impeached by a proper party. In the first instance, confirmation has no proper application to it, but when there is an effort to avoid the act, it becomes important to inquire whether there has been confirmation; for if so, the matter has passed beyond the control of the party, and is no longer voidable." Compare a distinction made between an infant's executed and his executory contracts, as to their binding force, commented upon *ante*, title "Void and Voidable."

It may furthermore be regarded as settled, contrary to expressions of opinion found in some of the foregoing cases, that the ratification of a contract entered into during infancy relates back to the time the contract was made, and renders it valid from the beginning: *Slator v. Trimble*, 14 Ir. C. L. 342; *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Reed v. Batchelder*, 1 Met. 559; *West v. Penny*, 16 Ala. 187, 191; *Doe ex dem. McCormic v. Leggett*, 8 Jones L. 425, 427; *Palmer v. Miller*, 25 Barb. 399; *Hall v. Jones*, 21 Md. 439; *Minock v. Shortridge*, 21 Mich. 304, 316. Thus, it is said by Graves, J., in *Minock v. Shortridge*, 21 Mich. 304, 315, "when a ratification occurs, it excludes all right to disavow the original undertaking, and makes it obligatory as against the defense of infancy. The new matter reaches back and renders the original contract binding from the time it was made, and the first agreement, having in its entirety received the assent of the promisor after the ceasing of his disability, is made in all its parts the binding contract of the parties." It follows, therefore, that if a promissory note made during infancy is confirmed, a transferee holds the paper as a valid negotiable instrument, on which he can maintain an action in his own

name: *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Reed v. Batchelder*, 1 Met. 559; and a ratification by infants of a contract of sale of their lands will inure to the benefit of the party entitled under the original vendee: *Hall v. Jones*, 21 Md. 439. So it is held the ratification of a mortgage executed during infancy will cut off a voluntary conveyance of the premises by the mortgagor to a third person, in trust for the mortgagor's wife and children, made intermediate the execution of the mortgage and its ratification: *Palmer v. Miller*, 25 Barb. 399.

Finally, it is the rule that a ratification once validly made of a contract entered into by the party while an infant is binding upon him, and cannot be recalled or disaffirmed: *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicross*, 72 Ala. 332; 47 Am. Rep. 418, 421; *Volts v. Volts*, 75 Ala. 555; *Hastings v. Dollarhide*, 24 Cal. 195; and see *Mustard v. Wohlford's Heirs*, 15 Gratt. 329; 76 Am. Dec. 209.

SUIT SHOULD BE BROUGHT ON THE CONTRACT RATIFIED, and if infancy is pleaded, the plaintiff should reply the confirmation. This is generally conceded to be the proper rule of pleading when a contract made during infancy is subsequently ratified, although some of the cases intimate that the plaintiff might, in case the defendant had made a new promise after coming of age, declare on the new promise: *Hunt v. Massey*, 5 Barn. & Adol. 902, 903; *West v. Penny*, 16 Ala. 187, 191; *Stern v. Freeman*, 4 Met. (Ky.) 309, 312; *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; *contra, Bliss v. Perryman*, 1 Scam. 484. In *Stern v. Freeman*, 4 Met. (Ky.) 309, 312, Bullitt, J., says: "Probably where a person after coming of age has promised to pay a debt contracted during infancy, or has done an act from which the law implies such a promise, the plaintiff might declare upon the new promise, relying upon the original consideration to support it. But he is not obliged to do so. He may declare upon the original contract, and show the new promise, like any other ratification, in avoidance of the plea of infancy. This results necessarily from the fact that the contract is voidable only, and not void. It is valid until disaffirmed. No ratification is needed to make it binding. Disaffirmance is needed to invalidate it. The plaintiff may, therefore, sue upon it, and if the defendant pleads infancy, the plaintiff may avoid the plea by showing a promise, or other act of ratification, by which the defendant has deprived himself of the right to avoid the contract. In such a case, the only effect of the ratification is to prevent the defendant from disaffirming the contract sued upon, which, being valid until disaffirmed, clearly forms the basis of recovery, the ratification forming matter of confession and avoidance to the plea of infancy."

If the contract is ratified by an absolute promise, we think that the action should always properly be brought upon the contract, and not upon the new promise. There seems to be no principle upon which the new promise, in such a case, can be regarded as a contract supplanting the contract ratified. It is true that there is a theory, noticed under the preceding head, that a ratification simply creates a new liability, based upon a moral consideration, but there is no sound reason to support it. Those who maintain the theory are compelled to say that the rule in question, by which an action can be brought upon the contract ratified, is an anomaly: See *Hodges v. Hunt*, 22 Barb. 150, 151. There are cases, however, where a new promise may not amount to a ratification at all, but an original undertaking, and where, therefore, no action can be brought upon the contract made during infancy, but only upon the new promise; or where the new promise may amount to a conditional ratification, and hence where no action can be brought upon the origi-

nal contract, or, perhaps, upon the new promise, until the condition has been performed. These cases can be best explained by quoting the language of Mr. Justice Graves in *Minock v. Shortridge*, 21 Mich. 304, 316, as follows: "The minor, on coming of age, may, however, fail or decline to assent to a confirmation of the first agreement, but may be willing to make himself liable upon a new, express, or implied undertaking based on the original consideration. He may, expressly or by implication, agree to terms which necessarily create a conditional, qualified, or restricted liability, and in such case, the first agreement is not ratified by the second. A new agreement is constituted, which is operative only from the time of its creation, and effective according to its nature. If the promise or act of the party after majority amounts to a conditional ratification, instead of a new substantive engagement, the contract made during minority may then be enforced, but not until the condition is fulfilled." And see *post*, "Ratification of Contracts, Executory on Infant's Part, by New Promises or Acknowledgments," and particularly the quotation under that head from *Edgerly v. Shaw*, 25 N. H. 514, 517; 57 Am. Dec. 349, 351.

If the rules of pleading do not admit of a reply, as in some of the code states, and the defendant, in an action upon a contract, pleads infancy, the plaintiff may give the ratification in evidence without alleging it in his original or in an amended complaint; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Hodges v. Hunt*, 22 Barb. 150; but where a reply to affirmative matter in the answer is required, and there is no reply of a ratification to a plea of infancy, evidence of such ratification is inadmissible, it being affirmative matter: *Petrow v. Wiseman*, 40 Ind. 148. Infancy is, of course, admitted by the replication of a new promise to a plea of infancy, and hence need not be proved by the defendant: *Goodsell v. Myers*, 3 Wend. 479.

RATIFICATION AFTER SUIT BROUGHT.—It has been very generally held that a ratification of a contract entered into during minority must be made before suit brought, in order that the action can be sustained against a plea of infancy: *Thornton v. Illingworth*, 2 Barn. & C. 824; 4 Dowl. & R. 545; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Ford v. Phillips*, 1 Pick. 202; *Freeman v. Nichols*, 138 Mass. 313; *Merriam v. Wilkins*, 6 N. H. 432; 25 Am. Dec. 472; *Hale v. Gerish*, 8 N. H. 374; *Aldrich v. Grimes*, 10 N. H. 194, 198; *Martin v. Byron*, Dud. (Ga.) 203, 204. This rule is founded on the notion that the contract of an infant is utterly invalid until it is ratified, and that the ratification creates the liability, although the rules of pleading permit an action to be brought on the contract. Thus, says the court in *Ford v. Phillips*, 1 Pick. 202, "the right of a party to recover is to be tried by its validity at the time when the action is commenced"; and in *Merriam v. Wilkins*, 6 N. H. 432, 25 Am. Dec. 472: "In the case of infancy, there is no cause of action until the contract is ratified after the infant arrives at an age when the law allows him to bind himself by a contract. The contract of an infant to pay for goods sold and delivered to him is, unless the goods are necessaries, no foundation for an action. The delivery of the goods may be a moral consideration which will sustain a promise to pay for them made after he comes of age. But such promise cannot relate back, upon any principle with which we are acquainted, so as to make the original contract a good foundation for an action from the beginning. There is no legal cause of action until the contract is ratified."

The rule, therefore, rests upon reasoning wholly indefensible, and it seems surprising that such a case as *Hyer v. Hyatt*, 3 Cranch C. C. 276, should have adopted it. Since, as has been said, the action is brought upon the contract itself, and not upon the ratification, and since the ratification simply

avoids the objection of infancy, [it would seem clear that a ratification, although made after the commencement of the action, should overcome the plea of infancy. This is the view taken by some cases, and we think it correct: *Wright v. Steele*, 2 N. H. 51; *Best v. Given*, 3 B. Mon. 72; *Slator v. Trimble*, 14 Ir. C. L. 342, 353; and see *Doe ex dem. McCormick v. Leggett*, 8 Jones L. 425, 427. The subsequent New Hampshire cases have, however, overruled *Wright v. Steele*, 2 N. H. 51, and taken the erroneous position noticed above.

RATIFICATION OF PART OF TRANSACTION. — The consequences of ratifying a part of a transaction have been fully discussed *ante*, under the title "Disaffirmance of Part of Transaction," and need not be repeated here. It is enough to say, as was said there, that a person cannot affirm a portion of a single transaction entered into during infancy, and repudiate the rest. He must abide by it, or disaffirm it *in toto*. And if he ratifies a part of the agreement, he ratifies it all.

RATIFICATION CANNOT BE MADE UNTIL FULL AGE. — It has been seen that an infant, in order that he may be completely protected, is permitted by the law to disaffirm certain of his contracts during minority. But, on the other hand, he can never ratify a contract while his infancy continues: *Corey v. Burton*, 32 Mich. 30; *Bank of Silver Creek v. Browning*, 16 App. Pr. 272. The reason is evident. Any attempted ratification would be subject to the same infirmity as the contract itself, and could not possibly render the contract binding, so that it could not afterwards be disaffirmed. But a replication to a plea of infancy, that the defendant, since the making of the promises, attained the age of twenty-one, and that, before the commencement of the suit, he ratified and confirmed the promises, is good after verdict, though it omits to allege that he ratified and confirmed after he became of age: *Cohen v. Armstrong*, 1 Maule & S. 724.

It might be here noticed that if the plaintiff replies to a plea of infancy that the defendant, after he attained the age of twenty-one years, ratified the contract, and the defendant takes issue on the allegation, the plaintiff need only prove the ratification, and the defendant must show his infancy at the time, the presumption being that when a person contracts he is of proper age, and the incapacity lying within the defendant's knowledge, and therefore properly to be proved by him: *Borthwick v. Carruthers*, 1 Term Rep. 648; *Hartley v. Wharton*, 11 Ad. & E. 934; 3 Perry & D. 529; *Bigelow v. Grannis*, 4 Hill, 206; *Bay v. Gunn*, 1 Denio, 108.

WHO MAY RATIFY. — So far as the question of disaffirmance of infants' contracts is concerned, it has been shown that infancy is a personal privilege, of which no one is permitted to take advantage except the infant himself, and his personal representatives and heirs. We do not see why the same rule should not apply to the ratification of infants' contracts. Indeed, it has been held that the contract of an infant may be ratified by his personal representatives after his death: *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108; *Bozeman v. Browning*, 31 Ark. 364, 374, 378; and that acts by the personal representative of an infant which would have amounted to a ratification by the infant himself will likewise amount to a ratification by the personal representative: *Shropshire v. Burns*, 46 Ala. 108; and that, therefore, where an infant purchased a horse, and died in possession of the same before attaining majority, the taking possession and sale of the horse by the infant's administrator, as a part of the infant's estate, with full knowledge that it had been purchased by the infant, and that a promissory note

given by the infant for the price had not been paid, is a ratification of the purchase, and consequently infancy will no longer be a defense to an action on the note: *Shropshire v. Burns*, 46 Ala. 108; but see *contra*, *Counts v. Bales*, Harp. L. 464. Where, however, the heir of a person who had conveyed lands during infancy filed a statement in the court where administration of the infant's estate was had that he had no other claim against the estate, except the amount due on guardian's account, the statement having reference to personal estate solely, has no bearing upon his claim as heir, and therefore is no affirmation of the infant's conveyance: *Illinois Land and Loan Co. v. Bonner*, 75 Ill. 315.

We may observe, in conclusion, that although an infant himself has not the legal capacity to confirm his contracts until he reaches his majority, yet we think it cannot be questioned that any other person, as above, to whom the law gives the privilege of ratifying the infant's contracts, and who himself labors under no disability, may exercise the privilege before the time at which the infant would have arrived at full age, had he lived: See *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Shropshire v. Burns*, 46 Ala. 108.

RATIFICATION IS QUESTION OF INTENTION, to be inferred from the conduct or words of the party ratifying: *Rainsford v. Rainsford*, Speers Eq. 385, 392; *Davidson v. Young*, 38 Ill. 145, 153; *McCarty v. Carter*, 49 Ill. 53, 56; 95 Am. Dec. 572, 576; *Durfee v. Abbott*, 61 Mich. 471, 478; *Scott v. Scott*, 29 S. C. 414. "Ratification," says the court in *McCarty v. Carter*, 49 Ill. 53, 56, 95 Am. Dec. 572, 576, "by an adult of a contract made by him when a minor is a question of intention. It can be inferred only from his free and voluntary acts or words." It is possible, however, that a party who will be deemed to have ratified his contract, made during infancy, by his conduct after coming of full age, may have no distinct idea of ratification, but his conduct be nevertheless inconsistent with any other result, as where, after coming of age, he retains property purchased for an unreasonable time, or uses it as his own, or sells it. In such a case, we should say that it would make no difference whether he distinctly contemplated a ratification or not. This is perhaps what Chancellor Harper had in mind when he said, in *Rainsford v. Rainsford*, Speers Eq. 385, 392: "I have looked a good deal into the cases in relation to the confirmation of contracts made by infants, and it appears to me either that it must directly appear that the act was intended to confirm, or that it was of such a nature as to operate a fraud on the other party if the contract were not affirmed, or what perhaps amounts to the same thing, to give an advantage to the infant contracting party to which he would not be entitled but on the supposition of the validity of the contract."

In *Burdett v. Williams*, 30 Fed. Rep. Rep. 697, where a minor, four months after coming of age, filed a petition to become a co-libelant in a libel by certain seamen of a vessel, under their written contract for wages, in which nothing was said in regard to his minority, and it appearing that he was neither intelligent nor provident, but that having heard that his associates had brought a suit for wages, obtained the services of the lawyer who was acting for the rest, it was held that there was not sufficient evidence of intelligent action to show a ratification of the contract.

The question as to what acts will amount to a confirmation has been held to be one which should be submitted to and determined by a jury, under proper instructions from the court: *Durfee v. Abbott*, 61 Mich. 471, 478; and see *Irvine v. Irvine*, 9 Wall. 617; *Southerton v. Whitlock*, 1 Strange, 690.

RATIFICATION MUST BE VOLUNTARY, the action of a free mind, exempt from all constraint and disability. This proposition is sustained by a few decisions and by the *dicta* of many cases, and is unquestionably correct, since the confirmatory acts involve a mental assent. It applies particularly to a ratification by means of an express promise: *Harmer v. Killing*, 5 Esp. 102; *Kay v. Smith*, 21 Beav. 522; *Sims v. Everhardt*, 102 U. S. 300, 312; *Alexander v. Hutcheson*, 2 Hawks, 535, 536; *Dunlap v. Hales*, 2 Jones L. 381, 382; *Turner v. Gaither*, 83 N. C. 357, 363; 35 Am. Rep. 574, 577; *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Reed v. Boshears*, 4 Sneed, 118; *Fetrow v. Wiseman*, 40 Ind. 148; *McCarthy v. Carter*, 49 Ill. 53, 56; 95 Am. Dec. 572, 574. A promise, or other positive act of confirmation, must, therefore, not be made under duress, or procured through fraud. In *Chandler v. Simmons*, 97 Mass. 508, 512, 93 Am. Dec. 117, 120, it was held that a ratification by a person of his deed of conveyance, made during infancy, by waiver, or implied from acts or from an omission to avoid, requires on his part a mental and legal capacity to exercise the right, and to bind himself by such act or omission; and his express acts of confirmation are in the nature of a contract, and require all the elements of a contract, except a new consideration, to give them effect; and, therefore, the express ratification by an adult of a deed of conveyance made by him while a minor is void, if made after proceedings to place him under guardianship as a spendthrift have been taken, which resulted in the appointment of a guardian, under a statute which provides that "if a guardian is appointed upon such complaint, all contracts, except for necessities, and all gifts, sales, or transfers of real or personal estate, made by the spendthrift after such filing of the complaint and order, and before the termination of the guardianship, shall be void."

RATIFICATION, WHETHER MUST HAVE BEEN MADE WITH KNOWLEDGE OF NON-LIABILITY. — The rule is sustained by the decisions and *dicta* of a considerable number of cases that a new promise, or other express confirmatory act of a contract entered into during infancy, must, in order to amount to a binding ratification, be made by the party with full knowledge that he is not legally liable upon the contract: *Harmer v. Killing*, 5 Esp. 102; *Tucker v. Moreland*, 10 Pet. 59, 76; 1 Am. Lead. Cas. *224, *233; *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margarita*, 3 Pa. St. 428; *Alexander v. Hutcheson*, 2 Hawks, 535, 536; *Dunlap v. Hales*, 2 Jones L. 381, 382; *Turner v. Gaither*, 83 N. C. 357, 363; 35 Am. Rep. 574, 577; *Scott v. Buchanan*, 11 Humph. 468; *Reed v. Boshears*, 4 Sneed, 118; *Norris v. Vance*, 3 Rich. L. 164; *Petty v. Roberts*, 7 Bush, 410; *Fetrow v. Wiseman*, 40 Ind. 148; *Baker v. Kenneth*, 54 Mo. 82; *Owen v. Long*, 112 Mass. 403; *Eureka Company v. Edwards*, 71 Ala. 248; *Flaxner v. Dickerson*, 72 Ala. 318; *Hatch v. Hatch's Estate*, 60 Vt. 160, 171. This rule, however, has been severely condemned, and it has been held, on the other hand, not to be necessary to a valid ratification that the party should know that he is not legally liable by reason of his infancy: *Morse v. Wheeler*, 4 Allen, 570; *Anderson v. Soward*, 40 Ohio St. 325; 48 Am. Rep. 687; *Ring v. Jamison*, 66 Mo. 424; *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774; compare *Owen v. Long*, 112 Mass. 403; the court saying in *Morse v. Wheeler*, 4 Allen, 570: "It is a long-established legal principle that he who makes a contract freely and fairly cannot be excused from performing it by reason of his ignorance of the law when he made it"; and in *Taft v. Sergeant*, 18 Barb. 320, it was held that it is to be presumed, in the absence of evidence to the contrary, that at the time a person makes a new promise to pay a debt incurred during infancy, he was aware of his rights, and knew the facts necessary to establish his exemption from legal liability.

While we agree with what the court says in *Morse v. Wheeler*, 4 Allen, 570, in its application to contracts, we do not think that it should be applied to the removal of a disability. It seems to us that if the objection of infancy to a contract is to be removed, the party should, as a rule, know that such an objection exists, before he is held bound by his acts and conduct.

BURDEN OF SHOWING RATIFICATION RESTS UPON HIM WHO CLAIMS IT. — If, then, to an action on a contract, the defendant pleads infancy, unless the plaintiff takes issue upon that fact, or unless he shows that the contract was for necessities, he will be obliged to reply a ratification by the defendant after coming of full age, if a reply is permitted by the rules of pleading, and, at all events, prove the ratification: *Dockery v. Day*, 7 Port. 518; *Fant v. Cathcart*, 8 Ala. 725; *Walsh v. Powers*, 43 N. Y. 23, 26, 27; 3 Am. Rep. 654, 655; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27, 28; *Catlin v. Haddock*, 49 Conn. 492; 44 Am. Rep. 249, 254; *Tyler v. Estate of Gallop*, 68 Mich. 185; 13 Am. St. Rep. 336. Although, in such a case, as seen above, under the head "Ratification cannot be Made until Full Age," it does not devolve upon the plaintiff to prove, in the first instance, that the ratification was made by the defendant after full age, but the burden rests upon the defendant to show his infancy at the time.

HOW A RATIFICATION MAY BE MADE. — There are three modes by which a contract made during infancy may be ratified: By express words; by acts and conduct which reasonably imply a ratification; and by an omission, under certain circumstances, to disaffirm within a reasonable time after reaching full age: See *Little v. Duncan*, 9 Rich. L. 55, 59; 64 Am. Dec. 760, 762; *Norris v. Vance*, 3 Rich. L. 164, 168; *Tobey v. Wood*, 123 Mass. 88, 89; 25 Am. Rep. 27, 28. These modes of ratification will now be considered.

NEW CONSIDERATION IS NOT REQUIRED TO A VALID RATIFICATION. — This is a rule which applies particularly to new promises made after full age. It has been seen that a ratification is simply a waiver of the objection of infancy to the contract, and that an action should be based, not upon the ratification, but upon the contract. If, then, the contract, as is assumed, had a consideration, nothing further in that respect is required, in order to sustain an action upon it. Even the theory that the action is really founded on the ratification asserts that the moral obligation growing out of the contract is a sufficient consideration to support the ratification. Hence, in any aspect, no new consideration is necessary: *Kay v. Smith*, 21 Beav. 522; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *Conklin v. Ogborn*, 7 Ind. 553; and see *Chandler v. Simmons*, 97 Mass. 508, 512; 93 Am. Dec. 117, 120. It is sometimes said that a new promise must be equivalent to a new contract, or must possess all the ingredients of a complete agreement, in order to constitute a valid ratification: *Watkins v. Stevens*, 4 Barb. 168, 175; *Hodges v. Hunt*, 22 Barb. 150, 151; but this statement supposes that it is upon the new promise that the action is to be sustained, and even then, as just said, no new consideration is required. We think that the judges who assert such a *dictum* have been deceived by resemblances. A ratification must be the free and voluntary act, not brought about by deception, by a person having a competent mind; but it is no contract in any proper sense of the word.

RATIFICATION, WHETHER MUST BE IN WRITING. — Unless required by statute to be in writing, a ratification, being simply a waiver of the objection of infancy, and not a new contract, may be verbal, although the contract ratified be a deed of conveyance, or an instrument under seal generally, or, we should say, any contract required by law to be in writing: *Phillips v.*

Green, 5 T. B. Mon. 344, 353; *Wheaton v. East*, 5 Yerg. 41, 62; 26 Am. Dec. 251, 253; *Jefford's Adm'r v. Ringgold*, 6 Ala. 544; *West v. Penny*, 16 Ala. 187, 191; *Vaughan v. Parr*, 20 Ark. 600; *Stokes v. Brown*, 4 Chand. 39; 3 Pinney, 311. Compare *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182; and see post, "Ratification of Deeds, Leases, and Mortgages by Declarations and Recitals." In fact, it has been seen, the retention by the party of the specific consideration received during infancy for an unreasonable time after coming of age may itself amount to an affirmance, as also will the exercise of acts of ownership over the property: See *supra*, "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age." The effect of the ratification of a deed or contract relating to realty may, however, be controlled by the recording acts. If, as was said in *Black v. Hills*, 36 Ill. 376, 380, 87 Am. Dec. 224, 226, the ratification is by means of a written instrument, the instrument should be recorded, in order to protect the grantee, and if the ratification is by other means, a subsequent purchaser from the infant, after attaining full age, must have notice thereof, in order that he may be bound.

By Lord Tenderden's Act, 9 George IV., chapter 14, section 5, it was provided that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." This enactment has been substantially adopted in a number of the states of this country: Ky. Gen. Stats. 1887, c. 22, sec. 1; Miss. Rev. Code 1871, sec. 2898; 1 Mo. R. S. 1879, sec. 2516; S. C. Gen. Stats. 1882, sec. 2023; Va. Code 1887, sec. 2840; 2 W. Va. R. S. 1879, c. 95, sec. 1. The Arkansas statute differs somewhat: "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith": Digest of Stats. 1884, sec. 3334. And the present Maine statute reads as follows: "No action shall be maintained on any contract made by a minor, unless he, or some person lawfully authorized, ratified it in writing after he arrived at the age of twenty-one years, except for necessities, or real estate of which he has received the title and retains the benefit": R. S. 1883, c. 111, sec. 2.

It is very evident that Lord Tenderden's Act does not apply to every case of confirmation of a contract made during infancy. It applies to every express "promise to pay any debt" contracted during infancy, but it does not apply to an express promise to perform any other contract made during infancy, unless such promise is embraced in the word "ratification": See *Stern v. Freeman*, 4 Met. (Ky.) 309; and that there is a distinction between "promise" and "ratification," see *Mawson v. Blane*, 10 Ex. 206, 210, per Parke, B. The statute, also, does not apply, at least not generally, to ratifications other than by means of promises. Thus where an infant entered into the service of a milk-seller, and covenanted not to carry on the same business within two miles of the plaintiff's house for two years after quitting the service, and after he came of age he continued in the same service for eighteen months without repudiating the contract, it was held that this conduct amounted to a ratification of the contract in equity, and an injunction to restrain a breach of the covenant was granted: *Cornwall v. Hawkins*, 41 L. J. Ch. 435; 26 L. T. 607; 20 Week. Rep. 653. The court held that the statute would not be allowed to be made an instrument of fraud, and the defendant

could not rely upon it to enable him to repudiate the contract, after having taken the benefit of it for a considerable time after coming of age. Again, if an infant purchases personal property, and after coming of age sells the same, he thereby ratifies the contract, and is liable for the price, notwithstanding the statute: *Robinson v. Hoskins*, 14 Barb. 393; the court saying: "It is true that the plaintiff cannot sue upon the defendant's promise, made after he was of age, to pay the debt incurred during infancy, unless such promise is evidenced by a writing; but if the purchase is made during infancy, and the thing purchased has been kept and used by the infant till his arrival at age, and then converted to his own use, such conduct amounts to an election by the adult to stand by the contract made while he was an infant." We may add that the same would be true of any case where the infant continues to enjoy the consideration after coming of age. The Kentucky statute does not require the plaintiff to produce a written ratification, but only requires that the "ratification, or some memorandum or note thereof," shall be in writing, and therefore it is held a writing showing that the defendant has performed an act of ratification is as effective as one containing an express ratification: *Stern v. Freeman*, 4 Met. (Ky.) 309; and where a writing, addressed to another than the plaintiff, is relied upon, not as constituting a ratification or containing a promise, but as evidence of a ratification previously made by the defendant, it is entitled to the same weight as if it had been addressed to the plaintiff: *Stern v. Freeman*, 4 Met. (Ky.) 309.

If a case falls within the statute, the promise or ratification must, of course, be in writing. Hence no action can be maintained to recover for goods sold to a minor, unless the contract of purchase be ratified by a writing signed by him after arriving at the age of twenty-one years, or by some person thereto by him lawfully authorised: *Thurlow v. Gilmore*, 40 Me. 378; a verbal promise to pay will not suffice; nor can a set-off be sustained of a debt contracted by the plaintiff during infancy, and not ratified by him in writing after full age: *Rawley v. Rawley*, L. R. 1 Q. B. D. 460. The writing, furthermore, to amount to a ratification, must be a recognition by the party, after attaining majority, of the debt as a debt binding upon him: *Harris v. Wall*, 1 Ex. 122; *Maccord v. Osborne*, L. R. 1 C. P. D. 568; *Rowe v. Hopwood*, L. R. 4 Q. B. 1. "Any written instrument signed by the party," say Baron Rolfe in *Harris v. Wall*, 1 Ex. 122, "which in the case of adults would have amounted to the adoption of the act of a party acting as agent will, in the case of an infant who has attained his majority, amount to a ratification." And, says Cotton, L. J., in *Trowell v. Shenton*, L. R. 8 Ch. D. 318, 325, "a ratification in writing must, either in terms, or on the fair construction of the instrument, refer to the contract which is to be ratified, and treat it as a subsisting contract." Accordingly, it has been held that a written promise to pay a debt contracted during infancy was sufficient, although it did not contain the name of the creditor, the amount due, or the date, parol evidence being admissible to supply these particulars: *Hartley v. Wharton*, 11 Ad. & E. 934; 3 Perry & D. 529; but a promise made by a person at full age to pay a debt guaranteed by him during infancy, "as a debt of honor," is not such a ratification as is required by the statute to charge him: *Maccord v. Osborne*, L. R. 1 C. P. D. 568; and where goods were supplied by the plaintiff to the defendant while he was an infant, and when he came of age an account with the items and prices was submitted to him, at the foot of which he signed: "Particulars of account to the end of 1867, amounting to £162 6d., I certify to be correct and satisfactory,"—this does not amount to a recognition of the

debt as an existing liability, so as to be a ratification of the contract within the statute: *Rose v. Hopwood*, L. R. 4 Q. B. 1. So where an infant sold a horse with warranty of soundness, and took from the vendee a note in which it was stipulated that the horse should remain the vendor's property until the note was paid, an indorsement written on the note by the vendor after he became of age, and when the note was paid, that "the within note being paid, I hereby discharge the property thereby secured," cannot be construed as a ratification in writing of the warranty of the horse: *Bird v. Swain*, 79 Me. 529.

RATIFICATION OF CONTRACTS, EXECUTORY ON INFANT'S PART, BY NEW PROMISES OR ACKNOWLEDGMENTS.—There is a distinction, to some extent, as to what will amount to a ratification, between contracts which are executory on the part of an infant and those which are executed. It is not difficult to understand why the law might possibly require more positive acts to confirm the former than the latter. Yet we should say that where the ratification is based upon some such act of the infant after attaining full age, as the retention of the property received by him under the contract for an unreasonable time, the use or sale of the property, the acceptance of the consideration from the opposite party, and other such acts or conduct which are inconsistent with any other idea than an intention to abide by the contract, it makes no difference, or very little difference, whether the contract is executory or executed on his part. A ratification will be inferred in the one case about, if not quite, as readily as in the other. Where, however, words or declarations are relied upon to constitute a ratification, then, if the contract is executory on the part of the infant, especially if it is for the payment of money by him, the rule is sustained by numerous authorities that a mere acknowledgment of liability, as in the case of the statute of limitations, will not be sufficient to constitute a ratification, but that there must be an express or direct promise or confirmation: *Thrupp v. Fielder*, 2 Esp. 628; *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358; *Wilcox v. Roath*, 12 Conn. 550; *Catlin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249; *Bennett v. Collins*, 52 Conn. 1; *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Conklin v. Ogborn*, 7 Ind. 553; *Fetrow v. Wiseman*, 40 Ind. 148; *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28; *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 103; *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; *Whitney v. Dutch*, 14 Mass. 457, 460; 7 Am. Dec. 229, 230; *Ford v. Phillips*, 1 Pick. 202, 203; *Tappan v. Abbot*, cited 1 Pick. 203; *Barnaby v. Barnaby*, 1 Pick. 221, 223; *Thompson v. Lay*, 4 Pick. 48, 49; 16 Am. Dec. 325; *Peirce v. Tobey*, 5 Met. 168, 172; *Smith v. Kelley*, 13 Met. 309, 310; *Proctor v. Sears*, 4 Allen, 95; *Baker v. Kennett*, 54 Mo. 82; *Wright v. Steele*, 2 N. H. 51; *Hale v. Gerrish*, 8 N. H. 374; *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Alexander v. Hutcheson*, 2 Hawks, 535; *Dunlap v. Hales*, 2 Jones L. 381; *Turner v. Gaither*, 83 N. C. 357; 35 Am. Rep. 574; *Hinely v. Margarita*, 3 Pa. St. 428; *Chambers v. Wherry*, 1 Bull. L. 28; *Reed v. Boshears*, 4 Sneed, 118; *Hatch v. Hatch's Estate*, 60 Vt. 160; compare *Orvis v. Kimball*, 3 N. H. 314.

A ratification certainly will not be inferred from incidental and collateral circumstances, in the face of the party's explicit declarations that he did not intend to become bound: *Minock v. Shortridge*, 21 Mich. 304; nor will an offer to compromise be sufficient, since it is not even an acknowledgment of liability: *Martin v. Byrom*, Dud. (Ga.) 203, 204; *Bennett v. Collins*, 52 Conn. 1; nor does a submission of the question of liability to arbitration prove or tend to prove a ratification: *Benham v. Bishop*, 9 Conn. 330; 23 Am.

Dec. 358; but where the defendant, in an action of *assumpsit* for the price of goods sold, defeated the action on the ground that the account had been merged in a note executed by him therefor, it was held that he thereby necessarily affirmed the validity of the note, and the confirmation could be successfully replied to a plea of infancy set up by him in an action on the note: *Best v. Givens*, 3 B. Mon. 72.

Since a mere acknowledgment will not be sufficient to constitute a ratification, a part payment will not suffice: *Thrupp v. Fielder*, 2 Esp. 628; *Barnaby v. Barnaby*, 1 Pick. 221, 223; *Hinely v. Marjaritz*, 3 Pa. St. 428; *Callin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249; especially in case of a note, if it be evidenced by indorsements made by the payee on the note: *Callin v. Haddox*, 49 Conn. 492; 44 Am. Rep. 249. The following cases will also illustrate the proposition that a mere acknowledgment will not amount to a ratification. In *Ford v. Phillips*, 1 Pick. 202, 203, the defendant, in a conversation respecting a promissory note given by him when an infant, said that "he owed the plaintiff, but was unable to pay him; he would, however, endeavor to get his brother to be bound with him." It was held that this did not amount to a renewal of the promise. And where the defendant, after he came of age, said to the officer who had the writ to serve, "that his brother ought to have paid the note; that the writ should not go to court; that it should be settled; that he would see his brother, who ought to pay it," and after the writ was returned, "that he meant to go to jail on it," this evidence is likewise insufficient to establish a renewal of the promise: *Tappan v. Abbot*, cited 1 Pick. 203; so where the defendant, after attaining his majority, admitted that he owed a debt contracted during infancy, and said that "the plaintiff would get his pay," but refused to give a note, lest he might be arrested, it was also held that there was no such ratification as would render the defendant liable: *Hale v. Gerrish*, 8 N. H. 374; and where an infant purchased slaves, and gave a note for the price, and after he came of age, proposed in writing to give the slaves back and pay half the note, adding that if the holders of the note would not accept the offer, "I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part," there is no such new promise as will avoid the plea of infancy to an action on the note: *Dunlap v. Hales*, 2 Jones L. 381; and also where a minor received money of the plaintiff, and gave a note, promising to pay the same to the plaintiff's daughter, and after he came of age, being applied to by the daughter's husband, said it was not then convenient for him to pay it, but that on his arrival at a certain place, to which he was then bound, he should pay the plaintiff the money due him, it was held that this did not amount to an express promise to the plaintiff himself, or a renewal to him of the promise expressed in his note, and therefore a plea of infancy by his executors was a good defense to an action on the note; but as the evidence showed money in the hands of the deceased, intrusted to him, which he had not paid over, a general *indebitatus assumpsit* for money received for the use of the plaintiff might be maintained: *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167.

A direction by a testator in his will to pay his "just" debts, it is likewise held, is no answer to a plea of infancy: *Smith v. Mayo*, 9 Mass. 62; 6 Am. Dec. 28; *Martin v. Mayo*, 10 Mass. 137-139; 6 Am. Dec. 103; *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; for, said the court in the first case, in speaking of the will, "It was made some time after the testator came of age, and it may have had reference to debts contracted after that period. At any rate, it contains a direction to pay only just debts, and there is

nothing in the case from which we can infer that what was not in law a debt could be considered by the testator as a just debt." But a different view was taken, under similar circumstances, in *Merchants' F. Ins. Co. v. Grant*, 2 Edw. Ch. 544, and a bond and mortgage were taken as confirmed, by a direction by the mortgagor in his will, made after full age, to pay "all my just debts." The authority for the latter case is *Hampson v. Lady Sydenham*, Nels. Ch. 55, in which it was held that, in equity, a bond debt of an infant should be paid, where he had executed a will, while still under age, though of sufficient capacity to make a will, directing that his executrix should pay all his debts out of his personal estate, particularly those to which he had set his hand. The fact that the will was made under age does not seem to have been noticed.

On the other hand, also, where an infant, after coming of age, wrote a letter to the indorsee of his promissory note, saying, "all that is justly due shall be paid," this was held a sufficient absolute and express promise to remove the bar of infancy, the mere fact of infancy not rendering the debt not "justly" due: *Wright v. Steele*, 2 N. H. 51; and where an infant, after coming of age, said to the plaintiff and another creditor, "When I return from this voyage, I will pay you both," and at another time told the plaintiff, when pressed for payment, that he had not the money then, but when he should return from the voyage, he would settle with the plaintiff, it was held that these declarations had an immediate reference to the indebtedness incurred during infancy, and amounted to an express promise of payment: *Martin v. Mayo*, 10 Mass. 137; 6 Am. Dec. 103. So where an infant made a promissory note, and when of age, being applied to for payment, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it, and send it to the creditor, this was held to be a sufficient ratification: *Whitney v. Dutch*, 14 Mass. 457; 7 Am. Dec. 229. And a promise by an infant, after coming of age, to pay a promissory note, "if he signed it," is a sufficient ratification: *Tibbets v. Gerrish*, 25 N. H. 41; 57 Am. Dec. 307.

Furthermore, the promise or confirmation should be made by the infant, after attaining full age, to the opposite contracting party, or creditor, himself, or to his agent or attorney; at all events, admissions or declarations to a stranger cannot be relied upon as constituting a ratification: *Goodsell v. Myers*, 3 Wend. 479; *Bigelow v. Grannis*, 2 Hill, 120; *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380; *Chandler v. Glover's Adm'r*, 32 Pa. St. 509; and see *Jackson v. Mayo*, 11 Mass. 147; 6 Am. Dec. 167; compare *Orvis v. Kimball*, 3 N. H. 314; *Stern v. Freeman*, 4 Met. (Ky.) 309. A new promise, made to the attorney of the plaintiff, to whom the plaintiff had sent the note in question for collection, is binding: *Hodges v. Hunt*, 22 Barb. 150; and where the holder of a promissory note left it with his agent for collection, and the agent directed his clerk to present it to the debtor for payment, the clerk is not a stranger, and therefore a promise made to him is effectual to remove the defense of infancy: *Mayer v. McLure*, 36 Miss. 389; 72 Am. Dec. 190; so a promise by a party of full age to repay money which had been paid by a surety for him during his infancy, made to an agent of the surety, who was authorized to call on him for that purpose, is sufficient to charge him, notwithstanding there is no evidence that the agent disclosed his agency at the time, nor any express evidence that the party had knowledge of the authority: *Hoit v. Underhill*, 10 N. H. 220; 34 Am. Dec. 148.

The general rule on this subject under consideration is sometimes stated as though an express promise was always required. We think, however, that

this a mistake, and that there may be an express ratification without any promise whatever, although a mere acknowledgment will not answer. Thus, says Chief Justice Parker in *Whitney v. Dutch*, 14 Mass. 457, 460, 7 Am. Dec. 229, 230, "the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agrees to ratify his contract, not by doubtful acts, such as payment of a part of the money due, or the interest, but by words, oral or in writing, which import a recognition and a confirmation of his promise"; and the learned chief justice again says, in *Thompson v. Lay*, 4 Pick. 48, 49, 16 Am. Dec. 325: "A ratification may be proved in divers ways; but it cannot be inferred from a mere acknowledgment of debt, as in cases on the statute of limitations. A promise to pay is evidence of a ratification; so is a direct confirmation, though not in words amounting to a direct promise; as if the party should say, after coming of age, 'I do ratify and confirm,' or 'do agree to pay the debt.'" See also *Baker v. Kennett*, 54 Mo. 82; *Hatch v. Hatch's Estate*, 60 Vt. 160.

The use, then, of some such express words as "I ratify" is undoubtedly all that is required to constitute an affirmation, but we think that either such an express confirmation or an express promise is necessary. In our opinion the proposition is stated too broadly by some cases; as, for instance, *Alexander v. Hutchison*, 1 Dev. L. 13, where Henderson, J., says: "The law has prescribed no form in which this promise shall be made; it may be by words, it may be by signs or acts; anything which shows an acquiescence, or an assent of the party's mind, is sufficient." The latter portion of the quotation is not sustained by the authorities. In *Henry v. Root*, 33 N. Y. 526, 537, also, Davies, J., criticises the rule which requires an express promise on the part of the infant after attaining majority, and maintains that the contract of an infant may be revived by him "upon the same principles and for the same reasons and by the same means as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy." We believe, however, that the rule above stated as to the necessity of a direct promise or confirmation is correct, although the reasoning of some of the cases which support it is open to criticism. An express or direct promise or ratification is required, not because the original promise is void, or because an action is to be brought upon the new promise, for such, we have seen, is not the case, but simply because nothing short of an unequivocal expression of an assent to be bound will or ought to remove the objection of infancy.

Thus far we have been speaking of an absolute and complete promise or ratification; but besides this, the promise may be partial, or it may be qualified or conditional. The nature and effect of a partial promise were thus explained by Gilchrist, C. J., in *Edgerly v. Shaw*, 25 N. H. 514, 517, 57 Am. Dec. 349, 351: "The partial promise, or the promise to pay or perform a part of the original debt or agreement, is binding only to the extent of the new promise, and is not a ratification of the original debt, but a new and distinct promise, though founded upon the original consideration"; and with respect to qualified promises he says (pages 517, 351): "A new promise may be qualified in various ways. It may bind the promisor to pay the debt at a different time or place from these originally stipulated. It may be a promise to pay, not in money, but in specific articles or in personal services. These cases cannot be distinguished, in principle, from that last stated. They are new contracts, not ratifications of the old ones." He continues: "Within the class of qualified promises in renewal of contracts entered into by an infant are the cases of new promises, to be performed upon a condition or a contingency. They are distinguishable from other cases of qualified prom-

lies by the nature of the qualification. . . . If a new promise be made to pay or perform a contract made under age, upon a contingency or a condition, no action will lie until the happening of the contingency or the performance of the condition, for the old contract will not until that time have been confirmed, and the new agreement is distinct from it; and of that, in the case supposed, there will then have been no breach. When the contingency has happened, or the condition is fulfilled, the new contract becomes absolute, the original contract is ratified, and the plaintiff may declare upon it, or upon the new agreement. If he declare upon the original contract, and infancy be pleaded, he may reply a confirmation, and upon proper evidence he will be entitled to recover. Or he may declare upon the new promise, and set it forth with the necessary averments; and upon sufficient proof will be entitled to recover in that case." See also *Minock v. Shortridge*, 21 Mich. 304, 315.

If, then, an infant, after attaining majority, promises to pay an indebtedness "as soon as he is able," or "as soon as he could," no action can be sustained against him, by virtue of such new promise, without proof of his ability to pay: *Cole v. Sazby*, 3 Esp. 159; *Thompson v. Lay*, 4 Pick. 48; 16 Am. Dec. 325; *Proctor v. Sears*, 4 Allen, 95; *Everson v. Carpenter*, 17 Wend. 419; *Chandler v. Glover's Adm'r*, 32 Pa. St. 503; compare *Bobo v. Hansell*, 2 Bail. L. 114. In *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349, a promise, made after majority, by the maker of a promissory note executed in infancy, to pay it at the end of a specified time in labor, or else in money, was held to be a conditional promise, which became absolute upon the expiration of the specified time, whereby the original contract was confirmed, and the promisor made liable to suit on either contract. In *Taft v. Sergeant*, 18 Barb. 320, it was held that where the defendant, who had executed a promissory note during infancy, promised the payee, after coming of age, to give him the note of a third person, and to pay the balance in money, the new promise was an affirmation of the defendant's note, and failing to comply with the provisions of the new promise, his liability on the note directly was complete, and the note stood revived and ratified, and discharged of the special contract in relation to the mode of payment: See also *Stokes v. Brown*, 4 Chand. 39; 3 Pinney, 311; *Little v. Duncan*, 9 Rich. L. 55; 64 Am. Dec. 760.

RATIFICATION OF DEEDS, LEASES, AND MORTGAGES, AND TRANSFERS OF PERSONAL PROPERTY BY DECLARATIONS AND RECITALS. — It seems that a ratification of a contract executed on the infant's part, such as his deed of conveyance, lease, or mortgage of his realty, or his sale of personalty, will be held to result from words somewhat less positive than in case of his executory agreements, just considered. In fact, as has been seen, according to one theory, an infant must disaffirm a deed of his lands within a reasonable time after attaining his majority, or he will be bound by his mere acquiescence: See *ante*, "Disaffirmance of Deeds within a Reasonable Time after Reaching Full Age." Yet the mere admission or recognition by a person of the fact that he had made a deed of conveyance during his minority will not amount to an affirmation of the deed: *Jackson ex dem. Brayton v. Burchin*, 14 Johns. 124; *Tucker v. Moreland*, 10 Pet. 59; 1 Am. Lead. Cas. *224; *Bayley v. Fletcher*, 44 Ark. 153; *Craig v. Van Bebbber*, 100 Mo. 584. Acts *in pais*, says Story, J., in *Tucker v. Moreland*, 10 Pet. 59, to amount to a confirmation of a deed, "should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable." And, says the court in *Den ex dem. Hoyle v. Stowe*, 2 Dev. & B. 320, 323, admitting that declarations are in any case sufficient to confirm a deed, yet loose and ambiguous words, from which inferences of opposite kinds may be drawn, ut-

tered incidentally by the grantor in casual conversations with third persons, and without deliberation, and without any view at the time of thereby confirming the deed, will not be sufficient. The declarations should at least be clear and unequivocal, and made with a view to ratification. Certainly, mere declarations of willingness by a person to confirm his deed executed during infancy, or a promise by him to make a deed of confirmation upon certain conditions, will not operate as an affirmance: *Clasmorgan v. Lane*, 9 Mo. 442.

But where an infant made a lease, and on coming of age said to his lessee, "God give you joy of it," it was held that he thereby affirmed the lease: *Anonymous*, 4 Leon. 4; and where an infant conveyed his land, and after coming of age, told the grantee that he would never take advantage of his having been an infant at the time of executing the deed, and that it was his wish that the grantee should keep the land, this was held to be a confirmation of the deed, entitling the grantee to recover the land, in ejectment, from one to whom the grantor thereafter conveyed it: *Houser v. Reynolds*, 1 Hayw. (N. C.) 143. The declarations may be coupled with other acts or conduct of a confirmatory character, making a stronger case of ratification. Thus in *Ferguson v. Bell's Adm'r*, 17 Mo. 347, an infant executed a deed, and after coming of age, expressed satisfaction with her bargain, received part of the purchase price, and spoke of her intention to make a confirmatory deed, but died suddenly without doing so, there was held to be a sufficient ratification; the court saying: "Any act of Miss Bell showing her acquiescence in the sale, and deed thereon by her after she became of age, would be sufficient, — such as receiving a part of the consideration money for the land, and expressing herself satisfied with the contract"; and where an infant, shortly before coming of age, executed a deed of land for a full price, and after he arrived at the age of majority, was often in the neighborhood of the land, saw the purchaser making valuable improvements, said nothing in disaffirmance for about four years, but admitted on several occasions that he had sold the land, had been honorably paid, and was satisfied, and at one time authorized a proposition for its purchase, it was held that these circumstances fully warranted the jury in finding that he had affirmed the contract: *Wheaton v. East*, 5 Yerg. 41; 26 Am. Dec. 251; the court observing: "Anything from which his assent, after he arrives at age, may be fairly inferred will be sufficient to affirm the deed made during infancy, and prevent him from afterwards electing to disaffirm it." See also *Phillips v. Green*, 5 T. B. Mon. 344; but compare *Rogers v. Hurd*, 4 Day, 57; 4 Am. Dec. 182. It was, however, held in *Matherson v. Davis*, 2 Cold. 443, 448, that the deed of an infant *feme covert* could not be ratified after she came of age, and while her coverture continued, by her declarations expressing her satisfaction with the terms of sale, nor in any manner, if at all, other than the mode provided by statute for the conveyance of the real estate of a *feme covert*. It seems to us that although the court says that the deed of a *feme covert*, executed and acknowledged according to statute, will pass the title as if she were a *feme sole*, yet the above ruling can only rest on the unsound theory that the deed passed no title.

Again, a deed executed by the grantor after coming of age, which refers to a deed executed by her during infancy, and purports to be made "in compliance" with the latter deed, operates as an affirmance of it: *Phillips v. Green*, 5 T. B. Mon. 344; and where an infant, after attaining his majority, indorsed on his deed, "I do acknowledge that I have signed, by making my mark, the within deed for the expressed purposes; and with the desire to ratify the same, I hereunto affix my hand and seal," and delivered the in-

strument to the grantee again, the deed is thereby confirmed: *Den ex dem. Murray v. Shantlin*, 4 Dev. & B. 289. There can be no doubt about the effect of such express words. The mortgage of an infant is also confirmed by the execution, after he comes of age, of a deed by which the land is conveyed "subject" to the mortgage: *President etc. of Boston Bank v. Chamberlin*, 15 Mass. 220; *Loscy v. Bond*, 94 Ind. 67; and see *Allen v. Poole*, 54 Miss. 323; and where a person takes a lease of an infant's lands, and the infant on coming of age mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease: *Story v. Johnson*, 2 Younge & C. Ex. 586.

RATIFICATION BY BRINGING SUIT. — If a person, after coming of age, institutes an action to enforce a contract, or based upon a contract, entered into during his minority, there is no doubt that, under ordinary circumstances, he will be held thereby to have ratified the contract, because his conduct shows an intention to abide by it. Therefore an infant waives an avoidance of a purchase of land made by him, on the ground of infancy, by suing his grantor, after attaining his majority, for an alleged fraud in the sale: *Middleton v. Hope*, 5 Bush, 478. But while a suit by an infant, after reaching full age, to enforce his agreement, is an act of affirmation, a suit by his assignee, claiming under an assignment from him during his minority, will have no such effect: *Carrell v. Potter*, 23 Mich. 377. And where a minor, four months after coming of age, filed a petition to become co-libelant in a libel by certain seamen of a vessel, under their written contract for wages, in which nothing was said in regard to his minority, and it appearing that he was neither intelligent nor provident, but that having heard that his associates had brought a suit for wages, obtained the services of the lawyer who was acting for the rest, it was held that there was not sufficient evidence of intelligent action to show a ratification of the contract: *Burdett v. Williams*, 30 Fed. Rep. 697.

RATIFICATION BY ACCEPTING CONSIDERATION. — If a person, after attaining his majority, accepts the consideration of a contract made by him while an infant, such an act very plainly amounts to a ratification of the contract. As where an infant lessor accepts rent after reaching full age: *Ashfield v. Ashfield*, W. Jones, 157; *Latch*, 199; *Godb. 364*; *Smith v. Low*, 1 Atk. 489; *Slator v. Trimble*, 14 Ir. C. L. 342; or receives interest under his agreement: *Franklin v. Thornebury*, 1 Vern. 132; or accepts the purchase price of property sold by him: *Ferguson v. Bell's Adm'r*, 17 Mo. 347; *Doe ex dem. McCormic v. Leggett*, 8 Jones L. 425, 427; *Highley v. Barron*, 49 Mo. 103; or receives a portion of the consideration for a mortgage of his property: *Keegan v. Cox*, 116 Mass. 289; or receives the proceeds of an award, pursuant to a submission of his claim to arbitration: *Jones v. Phoenix Bank*, 8 N. Y. 228. But, it is held, an infant *feme covert* is not estopped from disaffirming a deed of her lands, in which she united with her husband, from the fact that after she came of age the grantee paid the husband a portion of the purchase price, unless she knew that such purchase-money was unpaid, and the grantee was ignorant of the fact that the grantor was an infant when she executed the deed: *Scranton v. Stewart*, 52 Ind. 68. In *Owens v. Phelps*, 95 N. C. 286, it was held that where it is sought to establish that a person has ratified a contract in regard to his property, made while an infant, evidence is admissible to show that the money received in pursuance of such contract was used for the infant's advantage, with his knowledge. The evidence does not of itself show a ratification, but is admissible as explanatory of what occurred.

RATIFICATION BY RETENTION OF PROPERTY PURCHASED. — The effect of the retention of property purchased by a minor, after he becomes of age, has already been considered above, under the title "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age." But little more remains to be added. As there stated, the retention of personal property purchased during infancy, by the vendee, for an unreasonable time after he attains his majority, without any act of disaffirmance on his part, is inconsistent with any other idea than that of ownership, and therefore it will of itself amount to a ratification of the contract; although if, after coming of age, he uses the property or exercises other acts of ownership over it in addition, as, perhaps, will generally be the case, we should say that the question of time is then unimportant, and the contract is thereby affirmed: See *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85; 25 Am. Dec. 617; *Alexander v. Heriot*, Bail. Eq. 223; *Eubanks v. Peak*, 2 Bail. L. 497; *Thomasson v. Boyd*, 13 Ala. 419; *Aldrich v. Grimes*, 10 N. H. 194; *McKamy v. Cooper*, 81 Ga. 679; Georgia Code (1882), sec. 2731. So if an infant does not repudiate his contract of subscription for shares in a corporation within a reasonable time after coming of age, he will be held to have ratified the contract: *Cork etc. R'y v. Cazenove*, 10 Q. B. 935; *Leeds etc. R'y v. Fearnley*, 4 Ex. 26; *Northwestern R'y v. McMichael*, 5 Ex. 114; *Dublin etc. R'y v. Black*, 8 Ex. 181. An infant, also, who retains possession of real estate purchased or received in exchange by him for an unreasonable time after he attains full age thereby likewise affirms the contract of purchase or exchange: See *Cecil v. Comes Salisbury*, 2 Vern. 225; *Roberts v. Wiggan*, 1 N. H. 73, 75; 8 Am. Dec. 38, 40; *Boody v. McKenney*, 23 Me. 517, 524; *Baker v. Kenneth*, 54 Mo. 82; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Callis v. Day*, 38 Wis. 643; *Hook v. Donaldson*, 9 Lea, 56; *Ellis v. Alford*, 64 Miss. 8; and see *Evelyn v. Chichester*, 3 Burr. 1717; *Armfield v. Tate*, 7 Ired. L. 258; *Middleton v. Hoge*, 5 Bush, 478; *Ihley v. Padgett*, 27 S. C. 300; *Langdon v. Clayson*, 75 Mich. 204; Georgia Code (1882), sec. 2731; compare *Benham v. Bishop*, 9 Conn. 330; 23 Am. Dec. 358. A similar rule may be said to exist in case of a settlement of boundaries made during his infancy: *Brown v. Caldwell*, 10 Serg. & R. 114; 13 Am. Dec. 660; *George v. Thomas*, 16 Tex. 74; 67 Am. Dec. 612. An infant lessee who retains possession of the premises for an unreasonable time, and, perhaps, in any case, after a rent day, after he attains his majority, similarly ratifies the letting, as a consequence: *Boody v. McKenney*, 23 Me. 517, 524; *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429; *McClure v. McClure*, 74 Ind. 108; *Mahon v. O'Farrell*, 10 Ir. L. R. 527.

The retention of property may, however, be under such circumstances as not to indicate an intention to affirm the contract. Thus an infant cannot be held to have ratified a contract of purchase of personal property, because the property is still retained by him, after he has done all in his power to secure a rescission, and has brought suit for that purpose: *Houe v. Alexander*, 105 Ind. 109; 55 Am. Rep. 189, 191; and where an infant who had taken a conveyance of land made an attempt to disaffirm the contract before his majority, and again, within a few days thereafter, and upon the refusal of the grantor to rescind, offered to give the grantor a sum of money, together with the improvements erected by himself on the land, by way of compromise, and then abandoned the premises, and left them in a position for the vendor to occupy at any time he saw fit, his acts were sufficiently speedy and unequivocal to avoid the contract: *Baker v. Kenneth*, 54 Mo. 82; so the retention of possession and receipt of rents by a party, after majority, of a lot of

land purchased for her in her infancy, is not a ratification of the purchase, where she repudiated the purchase on the day she reached full age, and brought an action within three months thereafter to recover out of its sale so much of her money as was expended in its purchase: *Scott v. Scott*, 29 S. C. 414.

Again, where an infant transferred a portion of goods purchased by him to a third person to secure a debt, his retention of these goods for sale, after he became of age, as the servant of the assignee, does not amount to a ratification of the contract of purchase: *Thing v. Libbey*, 16 Me. 55. In *Smith v. Kelley*, 13 Met. 309, an infant bought goods, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ. The goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice, after reaching his majority, of his intention not to be bound by the contract of sale. It was held that there was not a ratification of the contract by the defendant, and the action could not be maintained. The court said that while if an infant, after coming of age, used the property bought as his own, or sold it, or kept it a long time, that would be evidence of ratification, yet such use, disposition, or retention must be a voluntary act on the part of the minor, by which he manifests an intention to keep the property. In *Todd v. Clapp*, 118 Mass. 495, in an action to recover the price of goods sold to a firm, one member of which was an infant at the time of the sale, it appeared that the action was brought before the infant became of age, and that a portion of the goods sold were attached upon the writ, among other goods; that the attached goods were sold at auction by consent of all parties, and were bid off by the grandfather and guardian of the infant; and that the infant, after coming of age, purchased the goods of his grandfather, and afterwards used and sold them for his sole benefit. It was held that the court correctly ruled that the jury could not find, from these facts, that the infant ratified the original contract. The court said: "The ground upon which the retention and use by a defendant, after he becomes of age, of property bought while he was an infant, are held to be an affirmation of the contract of purchase, is, that these acts show a promise or undertaking to perform it after his incapacity to make contracts is removed. His only right to retain the goods is by virtue of the contract, and he can conscientiously do it only upon the assumption that the contract is valid. But the case at bar is different. The defendant, Clapp, after he became of age, did not claim or hold the goods under or by virtue of the contract with the plaintiffs. He held them by virtue of a new and independent contract of purchase. There is no inconsistency in his claim to hold the goods under this new purchase and his claim that his contract with the plaintiffs was invalid, and no inference can be drawn, from his thus holding the goods, of an intention to ratify and affirm the plaintiffs' contract." And in *Maupin v. Grady*, 71 Mo. 278, where a minor, on the sale of land under a deed of trust executed by his mother and brother to secure a debt, gave his promissory note for the balance of the debt remaining after the sale, and, after coming of age, the minor bought the land from the purchaser, it was held, in an action against him on the note, that the doctrine that infancy could not be invoked as a defense to a note while the defendant held the property for which it was given was not applicable, since the note was not given for the land. See also *Baker v. Stone*, 136 Mass. 405; *Carrell v. Potter*, 23 Mich. 377. It has also been held that the fact that a married woman united with her husband in enjoying or exercising dominion over property received by the husband as part of the

consideration for a conveyance of her lands does not preclude her from asserting the disability of infancy against her grantee or his successors: *Buchanan v. Hubbard*, 96 Ind. 1.

Furthermore, an infant who enters into a partnership does not, by receiving profits of the partnership during his minority, and retaining the same after he comes of age, become liable for partnership debts contracted before dissolution, which occurred before he came of age: *Dana v. Stearns*, 3 Cush. 372, 375; and the fact that infants retained and sold the crops raised by them on land which they had leased is not a ratification of their contract to pay rent, the consideration of the latter agreement not being crops, but the use of land, and the appropriation by defendants of the fruits of their labor not being such a positive and unequivocal act as to indicate an intention to bind themselves for the rent: *Fleener v. Dickerson*, 72 Ala. 318; so where a minor contracts for materials and labor for the improvement of his property, his receipt of the rents from the property so improved, after he becomes of age, will not amount to a ratification of the contract so as to give the contractor a mechanic's lien upon the property: *McCarty v. Carter*, 49 Ill. 53; 95 Am. Dec. 572. In *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27, a firm, of which an infant was a member, gave certain checks in payment for goods, and the infant supposed, when he came of age, and until after the firm's dissolution, that the checks, which were duly protested for non-payment, were paid. At the dissolution, which was seven weeks after the infant attained his majority, during which time he drew money from the firm for his personal use, some of the goods were unsold, but he did not know it, and his partners agreed with him to assume and pay all the firm debts. It was held that these facts would not justify a finding that there was a ratification by the infant of his promise to pay the checks.

RATIFICATION FROM FAILURE TO DISAFFIRM WITHIN REASONABLE TIME AFTER REACHING FULL AGE. — The question of the ratification of a contract made during infancy by the mere failure to disaffirm it within a reasonable time after attaining majority, where there has been no property retained or used, and no other act of affirmance, has already been fully discussed, and needs no further consideration: See *supra*, titles "Disaffirmance of Contracts, in General, within Reasonable Time after Reaching Full Age," "Disaffirmance of Deeds within Reasonable Time after Reaching Full Age," and "Disaffirmance of Deeds of Infant Females Covert after Reaching Full Age."

RATIFICATION BY SALE OR CONVEYANCE OF PROPERTY PURCHASED. — If an infant purchases personal property, and after coming of age, sells the same, such an act of ownership will very evidently amount to a ratification. If the retention or use of property ratifies the contract, certainly a sale of it will have that effect: *Cheshire v. Barrett*, 4 McCord, 241; 17 Am. Dec. 735; *Lawson v. Lovejoy*, 8 Me. 405; 23 Am. Dec. 526; *Williams v. Brown*, 34 Me. 594; *Deason v. Boyd*, 1 Dana, 45; *Robinson v. Hoskins*, 14 Bush, 393; *Shropshire v. Burns*, 46 Ala. 108; *Minock v. Shortridge*, 21 Mich. 304; compare *Aldrich v. Grimes*, 10 N. H. 194, 198; *Counts v. Bates*, Harp. L. 464. And there is no distinction, in this respect, between personal and real property. A sale and conveyance of real estate purchased during infancy is an affirmance of the contract of purchase: *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombe*, 6 Me. 89; 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191; 21 Am. Dec. 84; *Henry v. Root*, 33 N. Y. 526; *Walsh v. Powers*, 43 N. Y. 23, 26; 3 Am. Rep. 654, 655; *Williams v. Mabee*, 7 N. J. Lq. 500; *Middleton v. Hoge*, 5 Bush, 478; *Johnston v. Fournier*, 69 Pa. St. 449; *Thomas v. Pullis*, 56 Mo. 211, 219; *Uecker v. Koehn*, 21 Neb. 559; 59 Am. Rep. 849; *Buchanan v. Hub-*

bard, 119 Ind. 187. But if an infant purchases real estate, and agrees as part of the consideration to pay off a mortgage thereon, and subsequently, but before she comes of age, conveys the land to another, the retention of the fruits of the sale after she attains her majority is not an affirmance of her agreement to pay off the mortgage: *Waleh v. Powers*, 43 N. Y. 23; 3 Am. Rep. 654; see also *Currell v. Potter*, 23 Mich. 377; and where an administrator, who had sold the land of an infant without authority, other than the latter's consent, invested part of the purchase-money in another tract of land, which he conveyed to the infant, and the infant, on arriving at age, repudiated the sale by the administrator, and afterwards conveyed the land purchased with the proceeds of that sale, at the direction of the administrator, without in any way profiting thereby, it was held that this did not operate as a ratification of the sale by the administrator: *Davidson v. Young*, 38 Ill. 145.

RATIFICATION BY VARIOUS MISCELLANEOUS ACTS. — There are a number of cases of a miscellaneous character concerning what acts or conduct will amount to a ratification, which remain to be noticed. An infant, it is held, confirms a purchase of land made by him, the title to which was taken in his mother's name, by executing and recording an instrument, after attaining his majority, by which he proclaimed his mother to be the true and only owner of the land, and declared himself to be her agent, manager, and co-occupant only, and by his continued use of the land as her property, held for his benefit: *Middleton v. Hoge*, 5 Bush, 478. A lease by an infant lessor is confirmed by him, where he, after reaching full age, gives a receipt to the lessee for an installment of rent, and indorses on the lease a confirmation thereof: *Slator v. Trimble*, 14 Ir. C. L. 342. And a ward affirms a contract with his guardian during infancy by executing, after majority, a receipt to the guardian for the property received under the contract: *Clark v. Van Court*, 100 Ind. 113; 50 Am. Rep. 774. Where a minor executes a deed of conveyance, and, on arriving at age, executes, jointly with the grantee, a mortgage of the same premises to secure a debt of the grantee, this is an affirmance of the deed, the mortgage being executed in conjunction with the grantee at his instance and for his benefit: *Watkins v. Wassell*, 15 Ark. 73; and where an infant mortgagor, after coming of age, takes no steps to disaffirm the mortgage, but procures releases of portions of the premises from the mortgagee, "such conduct was utterly inconsistent with the claim that the mortgage was invalid, and was a distinct recognition of its validity": *Wilson v. Darragh*, 28 N. Y. St. Rep. 390; and also, where an infant, having come of age, and entered into partnership with third persons, took a lease for his firm of a part of certain property, which he had conveyed during infancy, from the person to whom he had made the conveyance, the lease is proper to go the jury, in an action by the infant to recover other parts of the land conveyed, to show an affirmance of his deed for the whole; and with such evidence before the jury, the court rightfully refused to charge that the evidence showed no affirmance: *Irvine v. Irvine*, 9 Wall. 617. A redelivery of a deed or mortgage by an infant, after coming of age, amounts to a ratification of the instrument: *Davidson v. Young*, 38 Ill. 145, 153; *Palmer v. Müller*, 25 Barb. 399; and see *Den ex dem. Murray v. Shanklin*, 4 Dev. & B. 289.

An infant, after coming of age, ratifies an award made upon a submission by his guardian that the ward and infant heir shall pay an annuity to the widow in lieu of dower, where he pays part of the money then due, promises to pay the rest of that installment, and says that he had lodged property in his brother's hands to meet an annual payment: *Barnaby v. Barnaby*, 1 Pick.

221. If an infant partner, after attaining full age, transacts the business of the firm, receives its moneys, and pays its debts, these acts, unexplained, amount to a confirmation of the partnership, and make him liable for a debt of the firm contracted during his infancy: *Miller v. Sims*, 2 Hill (S. C.) 479; compare *Crabtree v. May*, 1 B. Mon. 289. An infant ratifies a contract of service by continuing in the service, without objection, after coming of age: *Forsyth v. Hastings*, 27 Vt. 646; *Spicer v. Earl*, 41 Mich. 191; 32 Am. Rep. 152, 155; *Cornwall v. Hawkins*, 41 L. J. Ch. 435; 26 L. T. 607; 20 Week. Rep. 653.

TORTS OF INFANTS CONNECTED WITH CONTRACTS. — The liability of infants for torts connected with their contracts, as well as for torts in general, will be found discussed in the note to *Humphrey v. Douglass*, 33 Am. Dec. 180; and what will now be said concerning the subject will be somewhat in the nature of a supplement to that note.

The general rule is elementary, as there said, that infants are liable for their torts; while, as has been seen, they are not liable, with certain exceptions, for the violation of their contracts. Even the contract of an infant made in settlement of his tort, it is held, stands on no privileged footing, but is voidable by him: *Shaw v. Coffin*, 58 Me. 254, 256; 4 Am. Rep. 290; *Hanks v. Deal*, 3 McCord, 257. "It must require," says the court in the last case, "at least as much capacity and discretion to contract about a tort as about the ordinary concerns of life." But the contrary, with much reason, has been held: *Ray v. Tubbs*, 50 Vt. 688; 28 Am. Rep. 519. If the tort of an infant is connected with his contract, it is a question of considerable dispute whether he should be held responsible because he is liable for his torts, or whether he may escape responsibility because he is not liable on his contracts. "Two principles," says Chalmers, J., in *Ferguson v. Bobo*, 54 Miss. 121, 127, "equally ancient and equally well settled with respect to the contracts and liabilities of infants, and which, as abstractly stated, seem not antagonistic, have been found in practice to produce two conflicting lines of decision, which it is difficult to reconcile; or rather, it is difficult to determine satisfactorily where one ends and the other begins: 1. The contracts of infants, except for necessities with which they have not been supplied by their guardians, impose no liability upon them which is not voidable at their election. 2. Infancy is a shield, and not a sword, and cannot be set up to defeat liability for torts, trespasses, or frauds." To give to each of these principles its appropriate force, and to prevent one from trenching upon the other is sometimes a difficult matter.

It has been seen that a minor is not estopped at law from setting up his infancy as a defense to an action upon his contract from the fact that he fraudulently represented himself to be of full age at the time the contract was entered into, or made any other false representations, whereby he induced the other contracting party to give him credit. In other words, his false representations as to his age, means of payment, and the like, will not render a contract, procured on their faith, binding upon him at law. He may, however, be estopped in equity, under such circumstances, from avoiding his contract on the ground of infancy. See *ante*, title "Infant's Concealment or Misrepresentation as to Age, etc." It is an entirely different question where an action is brought against the infant, not upon the contract, but sounding in tort, to recover damages for the fraud: See the observations of Chief Justice Parker in *Burley v. Russell*, 10 N. H. 184; 34 Am. Dec. 146. The rule is said to be general, that where the substantial ground of action is contract, a party cannot, by declaring in tort, render the infant liable, when he would

not have been liable on the contract. And it has been maintained that an infant is consequently not liable in an action, which would be, at common law, an action on the case, to recover damages for falsely representing himself to be of full age, whereby the plaintiff was induced to enter into a contract with him, which he failed or refused to perform: *Johnson v. Pie*, 1 Lev. 169; 1 Keb. 905, 913; 1 Sid. 258; *Price v. Hewett*, 8 Ex. 146, 148; *Bartlett v. Wells*, 1 Best & S. 836; *Brown v. McCune*, 5 Sand. 224, 229; *Nash v. Jewett*, 61 Vt. 501; and see *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. Dunham*, 1 Root, 272. "While it is true, as a general proposition of law," says the court in *Nash v. Jewett*, 61 Vt. 501, "that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*."

For the same reason, it has also been held that infancy is a bar to an action of deceit against a vendor for fraudulently selling property as his own, when it belonged to another: *Grove v. Neville*, 1 Keb. 778; *Doran v. Smith*, 49 Vt. 353; Chief Justice Pierpont saying in the latter case: "The representations alleged in the declaration are of the same character and stand upon the same principles as representations as to the quality of the property, — they enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved, or there can be no recovery. The contract is the basis of the action; the fraud is predicated upon the contract." And it has likewise been held, as intimated in the last quotation, that infancy is a good defense to an action to recover damages for a fraudulent warranty, representation, or concealment, on the sale of a chattel, as to its condition or quality: *Green v. Greenbank*, 2 Marsh. 485; *West v. Moore*, 14 Vt. 447; 39 Am. Dec. 235; *Gilson v. Spear*, 38 Vt. 311; 88 Am. Dec. 659; *Prescott v. Norris*, 32 N. H. 101; *Hewitt v. Warren*, 10 Hun, 560; and we should say that this would be particularly true where the action, founded upon a false warranty, is, in form, *ex contractu*; as where the breach of warranty is pleaded as an offset to an action by the infant on promissory notes: *Morrill v. Aden*, 19 Vt. 505. "An infant," says the court in *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659, "is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; but where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense." And in *Prescott v. Norris*, 32 N. H. 101, Chief Justice Perley observes: "If the tort for fraud of an infant arises from a breach of contract, although he may have been guilty of false representations or concealments respecting the subject-matter of the contract, he cannot be charged for a breach of his promise by changing the form of the action. In this case, the claim of the plaintiffs arises out of representations made on the sale, which were substantially part of the contract of sale. And false representations made by an infant at the time of his contract are regarded as so far part of it that he may set up his infancy as a defense. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable."

On the other hand, *Johnson v. Pie*, 1 Lev. 169, 1 Keb. 905, 913, 1 Sid. 258, which is the pioneer case on this subject, has been disapproved by some authorities in this country; and it has been held that where an infant obtains property on the faith of his fraudulent representations that he is of full age, an action

for the damages thereby sustained can be maintained against him: *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly, 334; *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53; and see *Carpenter v. Carpenter*, 45 Ind. 142; *Ferguson v. Bobo*, 54 Miss. 127 131; *Yeager v. Knight*, 60 Miss. 730. Chief Justice Parker, in *Fitts v. Hall*, 9 N. H. 441, says that such a representation was not a part of the contract, nor did it grow out of it, or in any way result from it. The distinction is a fine one, and does not seem to be fully appreciated by some of the later cases which reach the same end. The rule is eminently an equitable one, and although its foundation is somewhat shadowy, there is an inclination to sustain it as correct, and to hold it distinguishable from the cases where an infant fraudulently sells property as his own, or makes a fraudulent warranty as to its soundness or quality.

In *Word v. Vance*, 1 Nott & McC. 197, it was even held that an action of deceit would lie against an infant for falsely warranting a horse, exchanged with the plaintiff, to be sound; but the case stands alone in this ruling. In *Wallace v. Mores*, 5 Hill, 391, it was held that an infant who fraudulently obtains goods on credit, with an intention not to pay for them, was liable in tort to the party injured. The kind of action in tort does not appear, nor is any reason given for the decision; but it might be suggested in explanation that the defrauded party could have himself rescinded the sale under such circumstances, and have maintained trover or replevin. See also *Ashlock v. Fivell*, 29 Ill. App. 388. It is also true that if goods are sold to a minor for cash, and he fraudulently obtains possession of them without paying the cash, his infancy will not shield him from liability in an action on the case or in trover: *Mathews v. Cowan*, 59 Ill. 341; the fraud is really independent of the contract. It has been further held that an infant who is arrested for fraud in obtaining goods cannot be discharged from arrest on the ground that he is an infant: *Schunemann v. Paradise*, 46 How. Pr. 426; and that a minor may be prosecuted criminally for obtaining goods under false pretenses, although he might not be liable civilly for the particular fraud committed: *People v. Kendall*, 25 Wend. 399; 37 Am. Dec. 240. It should also be noted that if an infant avoids his contract for the purchase of property, whether the contract was induced by fraud or not, the contract being thereby rescinded on both sides, the vendor may maintain an action against the infant to recover the property if it be still in his possession, or damages for its conversion if he still has it at the time of avoidance of the contract, although, we should say, he should thereafter consume, destroy, or in any manner dispose of it: See the authorities cited *supra*, title "Adult's Right to Recover back Consideration from Infant on Disaffirmance."

Again, while an infant who hires a chattel is not liable for any non-feasance, or want of or failure to use care and skill, so long as he keeps within the terms of the bailment, yet if he departs from the object of the bailment, and uses the article for a different purpose than that for which it was hired, he is liable as for a conversion, and if he injures the chattel by any willful and positive act, he is responsible in damages for the injury: *Burnard v. Haggis*, 14 Com. B., N. S., 45; *Walley v. Holt*, 35 L. T. 631; *Homer v. Thwing*, 3 Pick. 492; *Green v. Sperry*, 16 Vt. 390; 42 Am. Dec. 519; *Towne v. Wiley*, 23 Vt. 355; 56 Am. Dec. 85; *Ray v. Twiss*, 50 Vt. 688; 28 Am. Rep. 519; *Eaton v. Hill*, 50 N. H. 235; 9 Am. Rep. 189; *Campbell v. Stakes*, 2 Wend. 137; 19 Am. Dec. 561; *Fish v. Ferris*, 5 Duer, 49; *Moore v. Eastman*, 1 Hun, 578; 4 Thomp. & C. 37. In Pennsylvania, it has, however, been denied that if an infant hires a chattel, as a horse, for one purpose, and uses it for another, and it is injured while being so used, trover will lie to

recover damages for the conversion, on the ground that the action "is an attempt to convert a suit, originally in contract, into a constructive tort, so as to charge the infant": *Penrose v. Curren*, 3 Rawle, 351; 24 Am. Dec. 356; *Will v. Welsh*, 6 Watts, 9. These cases are clearly opposed to the weight of authority; and the same may be said of *Jennings v. Randall*, 8 Term Rep. 335, and *Schenk v. Strong*, 4 N. J. L. 87, so far as they hold that an infant is not liable in any form of action for willfully and maliciously injuring an article of personal property hired by him.

Some of the decisions denying the infant's liability under the foregoing circumstances seem to do so, to a partial extent at least, on the ground that actions on the case, which were brought against the infants, could not be maintained. And in *Campbell v. Stakes*, 2 Wend. 137, 19 Am. Dec. 561, it was said: "If the infant was liable at all, trespass was the proper form of action. An action on the case necessarily supposes the defendant to have a right to the possession of the property under the contract of hiring at the time the injury is committed. Independent of the contract of hiring, the defendant would have no right to the possession, and trespass would be the proper remedy. If the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defense to such an action; for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy. The cases of *Jennings v. Randall*, 8 Term Rep. 335, and *Green v. Greenbank*, 2 Marsh. 485, were cases of that description." But this technical view is disregarded by other decisions, and in *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189, it was expressly, and we think correctly, repudiated.

It has also been otherwise held that an action of trover may be maintained against an infant for the conversion of goods intrusted to his care: *Vase v. Smith*, 6 Cranch, 226; 1 Am. Lead Cas. *237; *Peigne v. Sutcliffe*, 4 McCord, 387; 17 Am. Dec. 756; so detinue will lie against an infant, where goods were delivered to him for a special purpose not accomplished: *Mills v. Graham*, 1 Bos. & P. N. R. 40. Infancy, even, is no bar to an action of trover for specie and bank-bills deposited by the plaintiff with the infant as a stakeholder, pursuant to an illegal contract between the plaintiff and a third person: *Lewis v. Littlefield*, 15 Me. 233; 17 Me. 40. And where a farm was leased to an infant, the lessor reserving the property in the crops as security for the rent, the infancy of the lessee constitutes no defense to an action of trover by the lessor for the conversion of the crops, since the liability of the lessee did not arise from any breach of contract, but from an unlawful appropriation to his own use of the lessor's property: *Baxter v. Bush*, 29 Vt. 465; 70 Am. Dec. 429. So an infant prevailing on a plea of infancy in an action on a note given by him for a chattel which he obtained by fraud is still liable to an action of tort for the conversion of the chattel: *Walker v. Davis*, 1 Gray, 506; and see *supra*, "Adult's Right to Recover back Consideration from Infant on Disaffirmance." But where a complaint alleged an agreement between the parties, by which the defendant was to take and sell goods for the plaintiff, and account, at certain prices, for all he should sell, and return the goods not sold, and after alleging a demand of the defendant to return the goods, or account for the avails, pursuant to the agreement, alleged as a breach that the defendant had neglected and refused to account, but there was no allegation of a conversion, it was held that the action was upon contract, and not for a tort, and that infancy, therefore, constituted a good defense: *Munger v. Hea*, 28 Barb. 75.

In an infant has embezzled or tortiously or criminally taken money, or

converted into money property acquired in such a manner, he is even liable in an action for money had and received: *Briston v. Eastman*, 1 Esp. 172; *Peake* N. P. 223; *Ebbell v. Martin*, 32 Vt. 217; *Shaw v. Coffin*, 58 Me. 254; 4 Am. Rep. 290; and see *Peigne v. Sutcliffe*, 4 McCord, 387; 17 Am. Dec. 756. "If," says the court in *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290, "the minor is liable for his torts, it is immaterial to him in what form of action recompense is sought. If for the purposes of justice the tort may be waived in the case of an adult, and *assumpsit* maintained, it can, to accomplish the same great purpose, be equally well waived as to the minor."

SOEDER v. ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.

[100 MISSOURI, 673.]

EVIDENCE THAT DEATH RESULTED FROM DEFECTIVE RAIL, WHAT SUFFICIENT TO GO TO JURY.—In an action against a railway company to recover damages for the death of a brakeman, evidence showing that the deceased was engaged at night in switching cars of the defendant upon a track in which there was a defective rail, in passing over which a car would be jolted; that when last seen he was standing on the top of one of the cars in the discharge of his duties; and that his dead body was found in a condition and at a place consistent with the inference that he had been thrown from the top of the car by the jolting caused by its passing over the defective rail, and run over by the wheels of the car,—is sufficient to authorize the submission of the case to the jury, although no one witnessed the accident. And whether there was a substantial defect in the track caused by the defective rail, and whether the deceased was familiar with the track in question, are questions for the jury, as different conclusions might be drawn from the evidence thereon.

UNSAFE BY EMPLOYEE OF UNSAFE CONDITION OF APPLIANCE DOES NOT DEFEAT RECOVERY WHEN.—The knowledge of a brakeman of the unsafe condition of the railroad track upon which he was killed will not defeat a recovery for his death, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work on it by the use of care and caution.

WIDOW SUING FOR DEATH OF HUSBAND MAY TESTIFY AS TO NUMBER OF HER INFANT CHILDREN; and it is not such error as will call for a reversal to permit her to testify that she has an infant child by a former husband, where there is nothing in the amount of the damages assessed to suggest the idea that it may have been affected by the fact that she had such child.

ACTION to recover damages. The opinion states the case.

B. Pike, for the appellant.

A. R. Taylor, for the respondent.

BRACE, J. This is an action by the widow of William Soeder for damages for the death of her husband, alleged to

have been caused by the negligence of the defendant, in whose employ the said Soeder was, at the time of his death, engaged in the discharge of his duties as a brakeman.

Three grounds of recovery are stated in the petition: 1. That the accident was caused by the failure of defendant to have a sufficient number of men to manage and control the train; 2. By reason of a defective brake upon the cars of said train; and 3. By the negligence of defendant in permitting its track to be and remain in a defective condition at the point where plaintiff's husband was run over and killed.

The first ground was practically abandoned on the trial; upon the second, no evidence was introduced, and the case was tried, submitted, and turned upon the third alleged ground of negligence. The plaintiff recovered judgment for three thousand five hundred dollars. On the trial, the defendant demurred to plaintiff's evidence. The material evidence for the plaintiff bearing upon the issue submitted was, in substance, as follows: Mrs. Soeder, the plaintiff, testified that she is the widow of William Soeder; that at the time of his death, on the 27th of August, 1886, he was twenty-nine years and six months old; that he was a brakeman in the employ of defendant, for whom he had been working in the yard since the 4th of July preceding his death; that he was a sober and industrious man, receiving as wages about seventy dollars per month; and in answer to the question how many children she had, said: "I have one by him; I have two little ones. I have been twice married." She further testified that her husband had worked about three years as fireman and brakeman for the Missouri Pacific Railway Company before he worked for the defendant.

C. W. Sergeant testified that the track upon which the accident happened was an Iron Mountain track; that from Stein Street as one goes down towards the river the grade is very steep; that they were "hauling" Vandalia, Ohio and Mississippi, and Chicago and Alton cars that night, all of which were heavily loaded; they were transfer cars that had been taken out of the yard loaded with ore; that they only took half the cars at a time, shoved them on the switch-track, and left them northeast of the Stein Street crossing, and went back to get the other half; that witness stood at the crossing to make the coupling; that they, he, and Soeder were shoving the cars in there around a sharp curve, and Soeder had to

stand on the main track to pass signals from the engineer to witness. The examination then proceeded thus:—

"Q. Who had to do that? A. Soeder.

"Q. After he signaled, and the car moved, what did he do? A. He signaled back until I went in and made the coupling; after I made the coupling, I gave the signal 'All right; back up'; I answered the signal to get on top.

"Q. Is that a brakeman's place? A. Yes, sir; especially shoving in on a track like that.

"Q. Where did you get up? A. Right at the Stein Street crossing.

"Q. How was the train moving? A. Well, you can't judge; it is down grade in there. We just made the coupling, and after I go up on top, of course they were not moving more than three or four miles per hour."

After several questions were asked and answered as to the number of brakemen on the train, and the number that such a train ought to have, the examination on the main question was resumed, thus:—

"Q. When did you next see the deceased, William Soeder, after you saw him get up on top of the car? A. Not until the engine had come around the curve. The fireman came on the gangway and said: 'I think your partner has fallen off, and got hurt.'"

He then says, in substance, that he went down on the side of the train opposite to that on which Soeder was lying, and called him by name, got no answer, and went around on the other side of the train, and found Soeder lying there, about forty-five, fifty, or fifty-five feet northeast of Stein Street; that, from the appearances, Soeder must have been dragged from twenty to twenty-five feet; that the wheel's passed over him above the hips; his body was lying outside the rail, and his limbs were lying inside, under the cars; he was dead; that he examined the track there that night when he went to work the second time; that Davis, the night yard-master, was with him; that there was a defective rail there, a short rail, not more than from fifteen to eighteen feet long; that what is called the "ball" on the short rail was completely worn off, which made a kind of "offset" of an inch and a quarter, which would cause a car passing over it "to bound and jump"; that there must have been from four to six feet of this rail in that condition; that the top of the rail was splintered off, and the body of the rail lay on the ties; that the

condition of the rail would cause cars going over it to jump; that this defective portion of the rail commenced about three or four feet from where Soeder fell; you could see how far he was dragged by the cinders being dragged along with him, as though the place had been swept by a broom; this sweeping commenced three or four feet northeast of the defective rail; the train was going in a northeast direction; that he has examined the condition of this rail since the accident, and it is in about the same condition as it was then; that the rail connected with this rail was in a good condition; that the outside rail was higher than this short rail; that the joint connecting this short rail with the next rail was a bad one; that there was a "lip" on the rail there, which was a half an inch or three quarters of an inch; that he did not notice any other rail near there; that Soeder got off on the south side of the crossing, on the south side of Stein Street; that he thinks Stein Street is probably about twenty-five or thirty feet wide. If thirty feet wide, it was about fifty-five feet from where Soeder got on top of the car to the point where this defect in the track was; that he did n't see him fall, and did n't see him when he fell.

On cross-examination, this witness testified "that Soeder's body was found from forty to sixty feet from Stein Street; that if Soeder fell off from the car at the point where the appearance of dragging was, it must have been twenty-five or thirty feet from Stein Street; that the switch which witness opened is a little south of Stein Street, fifteen or twenty feet; that Davis, the foreman of the crew, was not there at the time of the accident; that the last time witness saw Soeder, he, Soeder, got onto the cars at Stein Street; that he did n't know where Soeder was when he was killed, or whether he was standing up or sitting down; that he did n't see Soeder after he got on the train, and that, not seeing him when he fell, witness does not know how Soeder fell, or how he was killed; that when Soeder fell off the cars, if he did fall, he was about forty or forty-five feet from Stein Street; that the switch he spoke of is south of Stein Street, and that the defective rail was thirty-five or forty feet from Stein Street."

The following question was asked witness in relation to the short rail:—

"Q. Is n't that a very common thing in a track, side-track in a yard, that kind of a rail; don't you find that sort of a rail very frequently on a side-track in a yard? A. Not a rail

battered down the way that was; I have seen rails battered down; yea, sir."

S. K. Harding testified, in substance, as follows: That he is a railroad-man, having been engaged as switchman and brakeman for about sixteen years; that he knows the Iron Mountain "ear" track at Stein Street; that he saw the rail of that track about thirty or forty feet north of Stein day before yesterday; that he went to look at it in company with Mr. Sergeant (the preceding witness), and a Mr. Donahue; that he saw the rail spoken of; it was a rail about fifteen or sixteen feet long; that the ball of the rail was worn off badly for about a distance of five or six feet from the joint, so as to give a fall of an inch or an inch and a half; that the west rail was a good rail, and was not worn off any; that the point where this rail was worn off is an inch or an inch and a half lower than the other part of the rail; that the effect of this low joint is like riding in a wagon on a country road and the forward wheel strikes a rut, like, if you have ridden in a wagon. Sitting on a car on standing on it, the sudden jar is liable to throw you off.

And on cross-examination, he testified that he saw this rail a day or so ago, and had seen it last winter when he worked there; that a car going over said rail would make a jolt of an inch or an inch and a half; that a car going over such a rail at three or four miles an hour would give a jar; that witness, as a railroad-man, had had many jars; that he does not know anything about the kind of cars that ran over the switch-track the night of the accident; that he had never seen the track there before the accident, and does n't know anything about the condition of said track at the time of the accident.

This was all the evidence upon which plaintiff relied for a recovery. The defendant did not stand on its demurrer to the evidence, but introduced evidence to sustain the issues upon its part. This evidence, however, did not tend to strengthen the plaintiff's case, but was confined to showing that the defective rail complained of had been there for an indefinite period of time before the accident, had been in continual use since, and was then in use on the day of the trial, was not in the condition testified to by plaintiff's witnesses, and was in a reasonably safe condition at the time of the accident. And the question remained for the court to determine, after all the evidence was in, Is there any evidence

tending to show that the defective rail was the cause of Soeder's death?

1. It satisfactorily appeared, from the evidence, that his death was the result of defendant's train passing over his body; that by some means his body got beneath the wheels of the train at a point on the track distant from the defective rail in the direction in which the train was traveling about four or five feet. The evidence would warrant the inference that just before the train entered upon this defective rail, the deceased was at his post, sober, in good health, on the top of one of the cars in the train, in the discharge of his duties as brakeman, and that he was exercising due care; that the car on which he was "jolted or jumped" on entering upon this defective rail. The distance from the place where they could have inferred this jolting took place to the place where it was found from the marks on the track that the body had fallen, considering the direction in which and the rate at which the cars were moving, was consistent with the theory that the fall was caused by the jolting of the car in its passage onto or over the defective rail; there is nothing in the facts tending to sustain any other theory, and under the authority of the rule laid down in the following cases, which has been reiterated in many others, the court could not have sustained the demurrer on the ground that there was no evidence tending to show that the death was caused by the defective rail: *Meyer v. Pacific R. R.*, 40 Mo. 151; *Kelly v. Hannibal etc. R. R. Co.*, 70 Mo. 604; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 221; 39 Am. Rep. 503; *Scovill v. Glasner*, 79 Mo. 449; *Turner v. Langdon*, 85 Mo. 438; *Cook v. Hannibal etc. R. R. Co.*, 68 Mo. 397.

2. As to whether there was a substantial defect in the track occasioned by the defective rail, or whether the deceased was familiar with this particular track, were questions also for the jury, as different conclusions might be drawn from the evidence on these subjects. Conceding, however; that the deceased was perfectly familiar with this track, and remained in defendant's employment, this of itself would not have been sufficient to defeat a recovery. The deceased's knowledge of the unsafe condition of the track, if it was unsafe, would not defeat a recovery, if "it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution": *Huhn v. Missouri Pac. R'y Co.*, 92 Mo. 440, and cases

cited. The court committed no error in refusing to take the case from the jury.

3. The judgment should not be reversed because the plaintiff was permitted to testify as to the number of her infant children; the husband was bound for the support of his own child, and his death cast this burden upon her: *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617; and there is nothing in the amount of the damages assessed to suggest the idea that it may have been affected by the fact that she had another child by a former husband.

4. Conceding that the evidence was sufficient to take the case to the jury, as we have found that it was, the issues were presented by an admirable series of instructions covering the whole law of the case, and including every proposition contained in the defendant's refused instruction that could properly have been given.

Finding no reversible error in the record, the judgment is affirmed.

EVIDENCE — DAMAGES. — Evidence of the number and ages of plaintiff's minor children is admissible in an action by a widow to recover for the death of her husband, where she is bound to support such children: *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74; 14 Am. St. Rep. 617. Compare extended note to *Louisville etc. R'y Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383, for the elements and measure of damages in actions for having caused the death of a human being.

WHEN A CASE MUST GO TO THE JURY. — If there is any competent evidence whatever to prove a fact in issue, the case should be allowed to go to the jury: *Page v. Parker*, 43 N. H. 363; 80 Am. Dec. 172; *Fickett v. Swift*, 41 Me. 65; 66 Am. Dec. 214. And this is true when there is evidence sufficient to authorize a verdict, even though not sufficient to require it: *Phillips v. Brigham*, 26 Ga. 617; 61 Am. Dec. 237.

CASES
IN THE
SUPREME COURT
OF
MONTANA.

KIRCHER *v.* CONRAD.

[9 MONTANA, 191.]

PRINCIPAL RESPONSIBLE FOR ACTS OF AGENT DONE WITHIN SCOPE OF HIS AUTHORITY. — A principal is responsible for the acts of his agent, when they have been done within the scope of his authority; and this liability will not be enlarged.

NO FORM OF WORDS IS ESSENTIAL TO CONSTITUTE EXPRESS WARRANTY in the sale of chattels.

CAVEAT EMPTOR, RULE OF, APPLIES WHEN. — In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the maxim of *caveat emptor* applies.

WARRANTY, WORDS WHICH DO NOT AMOUNT TO. — The plaintiff applied to defendants' agent in charge of their store to purchase some wheat, saying that he wished to buy spring wheat for seed. One of the defendants told him that they did not know whether the wheat they had for sale was spring or winter wheat, but said he would write and ascertain. Subsequently the plaintiff called at the store, and inquired of the agent in charge if they had received an answer. He said: "We have. It is spring wheat." On being asked if he was sure it was spring wheat, he replied: "What do you take me for?" These words were held not to amount to a warranty that the wheat was spring wheat.

EXPRESS WARRANTY, POWER OF AGENT TO GIVE. — The clerk of a storekeeper, in charge of his principal's business, has power under his employment to make an express warranty of the quality of grain sold by him.

ACTION to recover damages. The opinion states the case.

J. W. Strevell and James H. Garlock, for the appellant.

George F. Shelton and A. C. Botkin, for the respondents.

BLAKE, C. J. This is an appeal from the order of the court below in granting the motion of the respondents (who were the defendants in the action) for a new trial. The questions to be investigated may be readily understood by stating the substance of the pleadings.

The complaint alleges that the defendants were merchants in 1887, and that plaintiff purchased, through their "duly authorized agents and clerks," eighty-one bushels of wheat, to be used by him in the spring of 1887 for seed; that he informed the agents of defendants that he desired the wheat to be spring wheat for seed, to be sown that year; that defendants, by their agents, sold and delivered said wheat to plaintiff, and represented and warranted the same to be spring wheat, and fit to be used for sowing in the spring of 1887; that defendants charged plaintiff therefor eighty-five dollars, which plaintiff agreed to pay; that plaintiff believed the representation of the defendants, that said grain was spring wheat, to be true, and sowed the same in the spring of 1887; that said wheat was not spring but winter wheat, and therefore failed to produce any crop; and that plaintiff lost his entire crop of wheat for the season of 1887, and his labor in putting said seed into the ground, and was damaged in the sum of \$1,585.

The answer denies that plaintiff purchased any seed wheat, and alleges that he bought a quantity of wheat which was kept and sold as "chicken-feed," and that plaintiff was informed of the character and quality thereof at the times alleged in the complaint; denies that the agents or clerks of the defendants represented or warranted to plaintiff that said wheat was spring wheat, and says that the clerks and agents of defendants told plaintiff that they did not know whether the grain was spring or winter wheat; denies that the agents or clerks of defendants made any representations to plaintiff by which plaintiff was misled or deceived as to the kind or character of said wheat; alleges that said clerks and agents told plaintiff, at the time and before he bought the wheat, that they did not know whether it was winter or spring wheat, and that defendants had bought and sold said wheat for feed, and no other purpose, and defendants could not warrant the wheat in any manner as suitable for seed; and denies that plaintiff was misled or deceived or damaged by any representations of the clerks or agents of defendants.

The replication denies the averments of the answer.

The testimony at the trial tended generally to prove the allegations of the respective parties in their pleadings, and was conflicting. The jury found for the appellant, who is the plaintiff in the action.

The transcript does not disclose the grounds upon which the motion for a new trial was granted, and which may have been errors in law, or the insufficiency of the evidence to justify the verdict. If they were founded upon the last, then, as the testimony is conflicting, we must follow the case of *Chauvin v. Valiton*, 7 Mont. 581, and affirm the order appealed from. In conformity with the best practice which has prevailed in this court, and in order to settle the law of the case upon another trial, we deem it necessary and proper to review the questions which have been submitted, and decide every subject of controversy.

It is admitted that the respondents were dealers in general merchandise at the times which are mentioned in the pleadings; that one Tompkins was employed by them as clerk and salesman, and was in charge of their business when the wheat was delivered to the appellant; that the grain was subject to the inspection of the appellant, who bought the same in the belief that it was suitable for seed, in the spring of 1887; that no person can ascertain by inspection the difference between spring and winter wheat; that this grain was winter wheat; and that the appellant suffered damages through the total failure of his crop.

We shall assume, for the purposes of the discussion, that the testimony of the appellant is a narration of the facts, and can thereby distinguish some of the cases which have been cited by counsel as authority from that at bar. Kircher testified that in the fall of 1886 he looked at some wheat in the store of the respondents, and asked what kind it was. Tompkins said he did n't know, and that he sold it for chicken-feed. Kircher then said that if he knew it was spring wheat, he would buy sixty or seventy bushels; and Tompkins replied: "If you want to buy that much, we can find out." Kircher said: "If you can do that, find out"; and Tompkins told him "he would write and find out." That Tompkins then took Kircher back to Flager, in his office. That Flager, one of the respondents, told Kircher "he would write and find out." That afterwards Flager told Kircher "he did not have an answer, but expected one in a short time." That at another time, Flager said "he did not have an answer yet,

but expected one every day." That in March, 1887, Kircher went into the store, and said to Tompkins, who was then in charge of the business of the respondents: "How about that wheat? Have you an answer yet?" He said: "We have. It is spring wheat. We have just got a car-load of it." Kircher said: "Are you sure it is spring wheat?" and Tompkins replied: "What do you take me for?" The appellant then bought the wheat, but did not receive any statement or memorandum in writing concerning the transaction.

Did Tompkins, under these circumstances, and by virtue of his employment, have the authority to make this warranty, that the grain which was purchased by the appellant was spring wheat? This court has adopted the rule, which is not disputed, and has held that the principal is responsible for the acts of his agent when they have been done within the scope of his authority, and that this liability will not be enlarged: *Herbert v. King*, 1 Mont. 475; *Bank of Deer Lodge v. Hope Mining Co.*, 3 Mont. 146; 35 Am. Rep. 458; *Bank of Billings v. Hall*, 8 Mont. 341.

The power of Tompkins is also defined in the following authorities. In *Upton v. Suffolk County Mills*, 11 Cush. 586, 59 Am. Dec. 163, Mr. Justice Metcalf says: "A general agent is not, by virtue of his commission, permitted to depart from the usual manner of effecting what he is employed to effect: 3 Chitty on Commerce and Manufactures, 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold: Story on Agency, sec. 60; see also *Shaw v. Stone*, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured." Mr. Benjamin, in his treatise on sales, says: "The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency; and it is a question for the jury to determine what is usual": 2 Benjamin on Sales, 3d Eng. ed., sec. 945; see also *Pickert v. Marston*, 68 Wis. 465; 60 Am. Rep. 877; *Smith v. Tracy*, 36 N. Y. 79; *Palmer v. Hatch*, 46 Mo. 585; *Stewart v. Woodward*, 50 Vt. 78; 23 Am. Rep. 488; *McCormick v. Kelly*, 28 Minn. 135; 2 Addison on Contracts, 988.

Many of the cases which are relied on by counsel to establish the right of Tompkins to warrant the quality of the wheat are inapplicable to the facts before us. The foregoing testi-

mony of Kircher proves that the respondent Flager and Tompkins refused, upon several occasions, to express any opinion as to the character of the grain, except that it was chicken-feed. In reply to the request of the appellant, Flager promised to write a letter, and find out what he could upon this point. The conversation between Tompkins and Kircher, in which the words constituting the alleged warranty were used, was in logical effect a statement that an answer had been received by Flager, from some person who is not affected by these proceedings, conveying the information that the grain was spring wheat. Tompkins was not a party to this correspondence.

The complaint does not allege that Tompkins or the respondents have been guilty of fraudulent conduct, and the gist of the action is the warranty by the agents of the respondents, that the grain referred to was spring wheat.

No form of words is essential to constitute an express warranty in the sale of chattels. There is no controversy relating to these principles.

Do the conditions which have been presented subject the appellant to the rule of *caveat emptor*? The case of *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504, is on all fours with that set forth in the pleadings of the appellant. A portion of the statement of facts is as follows: "On the 9th of April, 1859, the plaintiff went to the defendants, who are dealers in grain, for the purpose of purchasing some seed spring wheat for sowing. He asked F. P. Grow, one of the defendants, whether he had any good seed spring wheat. Mr. Grow answered in the affirmative. . . . The plaintiff took the wheat, which he and the miller thought was spring wheat (there being both kinds in the mill), and sowed it; but it proved to be winter wheat." Mr. Justice Strong, in the opinion, says: "We have here the bald question whether, in sales of personal property, on inspection, without express warranty, the law presumes an engagement on the part of the vendor that the article sold is of the species contemplated by the parties. . . . The tendency of the modern cases has also been to the doctrine that, in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. Illustrations of this are found in sales of wine by wine merchants, of jewels by a jeweler, and of medicines by a druggist. In this class of cases the buyer and the seller do not deal on equal terms. . . .

The case before us is not one of this character. The wheat was not sold by sample, and neither the contract of sale nor the identity of the article was defined by a bill of parcels, nor was the subject of the contract a manufactured article, ordered and supplied for a particular purpose. True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that they are not the same in species. Still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee. . . . To the purchaser of goods on inspection, the language of the law is *caveat emptor*. There may be a few exceptions, such as we have referred to, but a sale of such an article as wheat is not one of them. When the purchaser has seen it, and gets what he saw, no warranty is implied that it is properly described by the name which the vendor gives to it."

The authorities hold that it is the duty of the buyer to make an inspection of goods, and the consequence of any omission so to do must be suffered by him. In *Barnard v. Kellogg*, 10 Wall. 383, Mr. Justice Davis says: "No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interest, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment, he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited": See also *Reynolds v. Palmer*, 21 Fed. Rep. 433, note by Lawson, 439; *Lindley v. Hunt*, 22 Fed. Rep. 52; 1 Parsons on Contracts, 5th ed., 577; Story on Sales, 4th ed., secs. 349, 378; Biddle on Warranties, sec. 5; 2 Benjamin on Sales, 6th Am. ed., 843, note 23.

The case of *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504, is doubted by Mr. Biddle, in his work on warranties, and the American editor of the work on sales by Mr. Benjamin: Biddle on Warranties, sec. 125; 2 Benjamin on Sales, 6th Am. ed., 843, note 23. But other text-writers have cited it with approval, and the same court has reiterated its doctrine in the

recent case of *Shisler v. Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738. It appeared that Shisler purchased of Baxter what both parties called "Wakefield cabbage" seeds, which cannot be distinguished by their appearance. After referring to *Lord v. Grow*, 39 Pa. St. 88, 80 Am. Dec. 504, Chief Justice Mercur says: "The vendee had just as much knowledge in regard to the kind and quality of the seed as they (the vendors) had. In such case, in the absence of express warranty, the exemption of liability of the vendor is too well settled to need any further citation of authorities." The application of these principles to the evidence of the appellant is sufficient to justify the court below in sustaining the motion for a new trial, and virtually disposes of the action, unless additional facts are shown.

While the form of the warranty is unimportant, the circumstances attending it must be critically examined. Professor Parsons expounds the law on this subject, and writes: "All warranties, however expressed, are open to such construction from surrounding circumstances, and the general character of the transaction, and the established usage in similar cases, as will make the engagement of warranty conform to the intention and understanding of the parties; provided, however, that the words of warranty are neither extended nor contracted in their significance beyond their fair and rational meaning. For these words of warranty are usually subjected to a careful, if not a precise and stringent, interpretation, as it is the fault of the buyer who asks for or receives a warranty if it does not cover as much ground and give him as effectual protection as he intended": 1 Parsons on Contracts, 5th ed., 576. When the evidence of the appellant is subjected to this test, it is difficult to say that Tompkins made a warranty in any form which would be recognized by the courts. It was the duty of the appellant to protect his interest by securing a bill of parcels which described in certain terms the wheat he purchased. The authorities hold that Tompkins had the power under his employment to execute this instrument, and thereby make an express warranty of the quality of the grain. The secret instructions of the respondents to their salesmen, which were not known by the appellant, cannot affect the transaction, and were properly excluded by the court below.

It is therefore adjudged that the order appealed from be affirmed, with costs.

AGENCY — PRINCIPAL'S RESPONSIBILITY FOR AGENT'S ACTS. — The act of an agent within the scope of his employment is binding upon the principal: *Kline v. C. P. R. R. Co.*, 37 Cal. 400; 99 Am. Dec. 282.

SALES — CAVEAT EMPTOR. — As to when the rule of *caveat emptor* applies in a sale, and when not, see note to *Barnard v. Duncan*, 90 Am. Dec. 426-431. In a sale of personalty, where there is no express warranty, and the purchaser inspects for himself the particular goods sold, the rule of *caveat emptor* applies, provided the seller is not guilty of fraud: *Hight v. Bacon*, 128 Mass. 10; 30 Am. Rep. 639, and note; *Lord v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504.

SALES — WARRANTY. — As to what is necessary to constitute a warranty in the sale of chattels, see *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, and note. An implied warranty of the fitness of things sold for ordinary use does not embrace defects discoverable by ordinary care: *Hoffman v. Oates*, 77 Ga. 701.

NEWELL v. MEYENDORFF.

[9 MONTANA, 264.]

CONTRACT NOT IN RESTRAINT OF TRADE WHEN. — A contract not in general restraint of trade, but limited as to place and person, which does not deprive the public of the industry of the party restricted, but which is simply a contract for the enlistment of such party's services as an agent of the other party to the contract, is not void as being in restraint of trade. Where, therefore, a party contracts to give to another the sole and exclusive right to sell and deal in a certain brand of cigars in a state, and not to sell said brand of cigars to any one else in said state, in consideration that the other party to the contract ceases to advertise and sell other brands of cigars from which he has been deriving profit, and purchases said brand of cigars from the former, and introduces and promotes the sale thereof in said state, such contract is valid, and not in restraint of trade.

PARTY TO ACTION BOUND BY RULINGS OF COURT OBTAINED ON HIS OWN MOTION. — A party to an action is bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. And where a plaintiff sues to recover the price of certain cigars sold to the defendant, and the latter seeks to recoup damages caused by a breach of contract by the plaintiff, and the court sustains a demurrer to the answer on the ground that the contract was void, being in restraint of trade, whereupon the defendant amends his answer, and sets up the same contract as an absolute defense, but the court, upon the conclusion of the trial, finds that the contract was not void, and gives judgment for the plaintiff, the plaintiff is estopped from receiving the benefit of the latter ruling of the court, to the effect that the contract was valid, and such latter ruling, though correct, deprives the defendant of a substantial right. And for the purpose of determining whether the defendant was deprived of a substantial right in such a case, the supreme court will look into the original answer in the case.

ACTION for goods sold and delivered. The opinion states the case.

J. B. Clayberg, for the appellant.

Cullen and Sanders, for the respondents.

DE WITT, J. The record in this case presents the following history: The complaint is for the price of cigars sold and delivered by plaintiffs to defendant. Defendant answered, and admitted the sale and delivery, and set up in recoupment a contract, the terms of which were, generally, that in 1886 he was dealing in cigars; that plaintiffs approached him to sell their "Flor de B. Garcia Cigars," agreeing that defendant should have the sole and exclusive right of selling, handling, and dealing in said cigars in Montana; that plaintiffs would not sell said cigars to any one else in the territory; that defendant would cease advertising and selling various other valuable brands of cigars in which he was dealing, and from the sale of which he was deriving much profit; that he would accept said sole agency, would purchase said brand of cigars from plaintiffs, and would introduce and promote the sale thereof to the best of his ability. The answer further alleges, in detail, the performance, by defendant, of his part of the contract, and the expenditure of large sums of money in placing said cigars upon the market. Then follows the allegation of breach by plaintiffs, in that they sold the said brand of cigars to other dealers in the territory, by which breach the defendant suffered great damage in his business, which damage he recoups against the plaintiffs' account for the cigars sold. The court below sustained a demurrer to this answer, on the ground that the contract pleaded was void as against public policy, being in restraint of trade, and could not be pleaded in recoupment. Defendant accepted the ruling of the court, and took leave to amend, which he did by pleading the same contract, not in recoupment, but as an absolute defense, on the ground that if the contract were void, the plaintiffs could not recover thereunder. The case went to trial in this condition, before the court without a jury. The theory of the case seems to have been preserved until the court made findings and conclusions of law, at which time he held that the contract was not void. Defendant presumably had not introduced evidence of damages by reason of breach, as he was not entitled to under the pleadings, and judgment was made and entered for plaintiffs for the amount claimed. Defendant seems not to have had a day in court. His motion for a new trial was

denied. From that order, and the judgment as well, he appeals, having saved his errors complained of by exception.

We will first construe the contract as to whether it must be considered void as in restraint of trade. The rule that contracts that are in restraint of trade shall be void, as against public policy, is among our most ancient common-law inheritances. In *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119, Morton, J., says: "As early as the second year of Henry V. (A. D. 1415), we find by the year-books that this was considered to be old and settled law. Through a succession of decisions it has been handed down to us unquestioned, till the present time." The learned judge traces the history of the rule to its modern modification, that "contracts in restraint of trade generally have been held to be void; while those limited as to time or place or persons have been regarded as valid, and duly enforced." He gives the reasons for the rule in the following language: "1. Such contracts injure the parties making them, because they diminish their means of procuring livelihoods, and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and they expose such persons to imposition and oppression. 2. They tend to deprive the public of the services of men in the employment and capacities in which they may be most useful to the community as well as themselves. 3. They discourage industry and enterprise, and diminish the products of ingenuity and skill. 4. They prevent competition, and enhance prices. 5. They expose the public to all the evils of monopoly; and this especially is applicable to wealthy companies and large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business, and engross the market. Against evils like these, wise laws protect individuals and the public, by declaring all such contracts void." See also cases in that opinion cited.

The doctrine is again well stated in *Lawrence v. Kidder*, 10 Barb. 641, in which case the court, Selden, J., cites with approval Bronson, J., in *Chappel v. Brockway*, 21 Wend. 157, as follows: "There may be cases where the contract is neither injurious to the public nor the obligor, and then the law makes an exception, and declares the agreement valid." In *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 68, Mr. Justice Bradley says: "There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void

as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objections is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration, and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced."

We have cited these reasons for the rule in full, in order to apply them to the contract under construction. They embody the modern doctrine, as held by the authorities. A recitation alone of the rule and its reasons seems to us sufficient to take the contract under consideration out of the operation of its prohibitions. The contract is not general; it is limited as to place and person. The public is not deprived of the alleged restricted party's industry. On the contrary, the contract provides for the placing upon the Montana market the product of the plaintiffs' industry, by the selection and services of a local Montana agent, interested in the success of sales, and to be rewarded by such success. Nor is there any injury to the party himself, the plaintiffs, by their being precluded from pursuing their occupation. Rather, by the contract, they seem to have sought a means of extending the field of their operations, and not of restricting them. In the light of the authorities, the rule and the reasons therefor, and the facts, we are clearly of the opinion that the contract was not in restraint of trade, and not void. It was simply a contract, for a consideration, for the enlistment of the services of an agent for the plaintiffs in their business. The court below was therefore correct in his last view of the contract. It follows that he was wrong in his first position, in sustaining the demurrer to the original answer.

Respondent urges that all the proceedings and pleadings, prior to the amended pleadings, on which the case was tried, are *dehors* the case on appeal; citing Sawyer, J., in *Barber v. Reynolds*, 83 Cal. 501: "The old complaint, in the form first filed, ceases to be the complaint in the case, or to perform any

further function as a pleading; but the amended complaint falls into its place, and performs the same and not different functions." Upon an examination of this case, we find the judge further saying: "The identity of the action is in no respect affected"; and it was preliminary to arriving at the conclusion last quoted that the previous utterance was made. The law, as counsel cites it, is true, as far as he goes. The old answer in the case at bar does not "perform any further function as a pleading"; but we are not precluded from examining that answer, and the sustaining of the demurrer thereto, for the purpose suggested *infra*. We are mindful of the consequences of defendant answering over, after demurrer sustained: *Francisco v. Benepe*, 6 Mont. 243. And we, at this time, recur to that ruling, and review the same, not as if an appeal had been taken therefrom to this court, but for the purpose of ascertaining whether the court in such decision, together with his latter reversal of his position, in the same case, did not deprive defendant of a substantial right, and exclude him from his day in court. If that be true, defendant has a remedy. *Ubi jus, ibi remedium*. If the contract be valid, defendant certainly has the right to recoup his damages. If the contract be void, defendant has the right to plead it in bar. But the court below changed front as often as defendant aligned himself with the court's last evolution. It was impossible for the defendant to keep pace with the movements of the court, who finally left him a judgment debtor, after having twice declared that he had a good defense, but each time when the court had placed defendant in a position where he could not avail himself of such defense. For the defendant's disasters, thus resulting, there must be a remedy. We find it as follows: A party in an action is bound by his pleadings. He is also bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error: 2 Herman on Estoppel, sec. 823, and note. A party is bound by his theory and presentation of his case. "A party cannot get relief on one basis, and then seek a new chance to litigate, on the suggestion that he has a defense, which he did not see fit to rely on before": *Beam v. Macomber*, 35 Mich. 457; see also *Belanger v. Hersey*, 90 Ill. 73; *Swezey v. Stetson*, 67 Iowa, 481. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a

different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law": *Ohio etc. R'y Co. v. McCarthy*, 96 U. S. 267; see also *Dreyfous v. Adams*, 48 Cal. 131; *Long v. Fox*, 100 Ill. 43; *McQueen v. Gamble*, 33 Mich. 344; *Callaway v. Johnson*, 51 Mo. 33; *Edwards's Appeal*, 105 Pa. St. 103.

When the plaintiffs in the case at bar had procured the ruling of the court that the contract was void, they placed their theory of the case upon record. Might they then, "upon afterthoughts, new suggestions, and new aspects of the case, change their position of the case from that on which they deliberately chose originally to present it to the court"? and especially after defendant had accepted the construction of the contract demanded by plaintiffs and held by the court. Plaintiffs were estopped by the position they had assumed, and into which they had forced defendant, when to change that position in the time and in the manner that it was changed deprived defendant of all defense whatsoever. The decision of the court holding the contract valid was made after the testimony was closed, and the case argued and submitted, and submitted on pleadings which forbade evidence in recoupment. If the court had made his reformed ruling before the close of the case, defendant could have obtained leave to amend himself back to his original position, and obtain a continuance on the ground of surprise, if necessary, to enable him to obtain and produce his evidence of damages. It would seem that the action of the court was accident and surprise, against which no ordinary prudence could have guarded. We are of opinion that plaintiffs were estopped from asserting that the contract was valid, or of receiving the benefit of the ruling of the court to that effect, when such ruling came at the time, in the manner, and under the circumstances that it did, and to the total deprivation to the defendant of his defense to the action. Therefore the latter ruling of the court, although correct, by construing the contract under the circumstances described, and entailing the results that it did, and taken with the former position assumed by the court, and depriving defendant of a substantial right, was error.

We make no reflection upon the distinguished judge who tried the cause. His reformation of his first opinion is a credit as well to his eminent and conceded ability as to his known sense of justice and probity. His action complained

of was more in the nature of a misfortune, which happened to be fatal to the defendant.

Respondent urges that the statement on motion for a new trial cannot be considered, as it was not settled by the judge who tried the case, but by his successor in office. It is not necessary to consider this objection, as the *data* for our conclusion are all found in the judgment roll, and the appeal is from the judgment, as well as the order denying the motion. We cannot leave this case without animadverting upon the record as it is presented. This court has heretofore had occasion to remind counsel that the preparation of a record is their duty, and it is not for them to leave the supreme court to grope through a disorderly mass of immaterial matter to ascertain that which counsel relies upon: *Upton v. Larkin*, 7 Mont. 462; *Raymond v. Thexton*, 7 Mont. 305; *Fant v. Tandy*, 7 Mont. 443; *Sherman v. Higgins*, 7 Mont. 479. In the record in this case, the complaint, second amended complaint, replication, judgment, notice of motion, and specification of errors all appear twice in full, instead of being once inserted, and afterwards noticed by appropriate reference. Where reference is made, pages are omitted. It is difficult to refer to page —. The matter is not presented in that orderly, systematic, chronological method that presents to the court an intelligent view of the case at a reading. When we do arrive at the gist of the matter, it is after such labor as caused the learned compilers of the Institutes of Justinian to say, in the dedication of that work, *Et opus desperatum, quasi per medium profundum euntes cœlesti favore ad implevimus*. The judgment is reversed, and the cause remanded for a new trial.

CONTRACTS IN RESTRAINT OF TRADE. — The question of the validity of contracts which are in restraint of trade is discussed in an extended note to *Angier v. Webber*, 90 Am. Dec. 751-765.

MONTANA UNION RAILWAY COMPANY v. LANGLOIS.

[9 MONTANA, 412.]

EXCLUSIVE DEPOT PRIVILEGES — RAILWAY COMPANY MAY NOT GRANT. — A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination in its requirements; and the grant by a railway company of a special privilege to a portion of the platform at its station to one hackman, to the exclusion of all others, is not such a rule or regulation as a common carrier has the right to adopt under its power to make and enforce all reasonable rules and regulations necessary to govern persons coming to its stations and platforms.

RIGHTS OF PASSENGERS AT RAILWAY STATIONS. — Passengers arriving at or departing from the railway station of a common carrier have a right to equal convenience and opportunity to approach such station or to depart therefrom, and are entitled to the benefit of whatever competition may grow out of the public demands, and the contests of others to supply such demands and receive compensation therefor.

RAILWAY COMPANY CANNOT GRANT EXCLUSIVE RIGHT TO PLATFORM AT ITS STATION. — Under the constitution of Montana, which provides that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company between persons or places within the state," a railroad company cannot grant to one person the special right to use a portion of its depot platform to deliver passengers departing and to receive and solicit the patronage of passengers arriving, to the exclusion of all other persons desiring to exercise the same right.

INJUNCTION. The opinion states the case.

M. L. Wines, for the appellant.

John J. McHatton, for the respondents.

HARWOOD, J. This is an action for an injunction. The complaint sets forth that the appellant is a railway corporation organized under the laws of the territory of Montana; that it is the owner of, and operating as a common carrier, a line of railroad running from Garrison, in Deer Lodge County, and divers other stations, to its station known as South Butte, in Silver Bow County, Montana, the latter station being about one and one half miles from the United States post-office in the city of Butte, in said Silver Bow County; that at the said station of South Butte the appellant is the owner of and in possession of a large number of railway tracks, yards, station grounds, and buildings; that the appellant has at said depot or station building at South Butte a long platform for the accommodation of passengers whom the appellant transports to and from said station, and that said depot grounds are surrounded by a board fence, inside of which hacks and wagons

are accustomed to drive for the purpose of conveying passengers to appellant's passenger trains, and receiving passengers from said trains; that at the time stated, and for a long time prior thereto, the appellant had a contract with the government of the United States, whereby the appellant was obliged to carry upon its trains the United States mail matter to said station at South Butte, and thence to the post-office at the city of Butte; that appellant contracted with Geoffrey and Thomas Lavell, in the name of Lavell Brothers, to carry said United States mail from said station at South Butte to the United States post-office at Butte City, and appellant further contracted with said Lavell Brothers to have an ample supply of hacks and omnibuses at said station at South Butte, at the arrival of all trains, for the safe and comfortable transportation of all passengers who desire such transportation from said station of South Butte to the city of Butte and points adjacent thereto; and in consideration thereof the appellant granted and agreed with said Lavell Brothers to give them the exclusive right to drive and stand their hacks, carriages, and omnibuses along the edge of the said platform; that respondents are the owners or drivers of hacks and carriages, and at the times complained of, and against the will and protest of plaintiff, have forcibly driven their hacks and carriages into said depot yard of plaintiff, and driven and stood such hack adjacent to and against the platform aforesaid, and have forcibly kept from such platform the hacks of Lavell Brothers; that plaintiff, by its agents and servants, have often protested to defendants against their conduct in that respect, and repeatedly told defendants that they could not occupy said platform privileges; but that plaintiff did offer defendants the privilege of driving into plaintiff's said depot at said station, and standing their hacks in said yard to deliver and receive passengers, provided the defendants would keep away from the said platform a distance of fifty feet, which place was clearly indicated to the defendants, and further, that defendants might have the privilege or driving and standing their hacks and carriages at a point on said platform east of the passenger depot, not occupied by the hacks of said Lavell Brothers; that notwithstanding these protests and concessions of plaintiff, the defendants continued to drive and stand their hacks next to said platform, and within said said fifty-feet limit; and defendants expressly decline to desist from driving and standing their hacks at said forbidden place, and expressly declare that they will persist in placing

their hacks at the platform reserved, as aforesaid, to Lavell Brothers; that if the defendants continue to do these acts complained of, or any of them, the plaintiff will be prevented from carrying out its part of the said contract with Lavell Brothers, and the latter will decline to transport the said United States mail from the station aforesaid, and to the post-office at Butte City, and to care for plaintiff's railway passengers as aforesaid; that plaintiff has not a plain, speedy, and adequate remedy at law.

Upon the facts set forth, the plaintiff prays that the defendants be restrained by injunction from driving or standing hacks, cabs, carriages, or buses at the said platform of plaintiff at the west side of its depot buildings, or within fifty feet thereof.

The defendants answer, and admit that defendant Charles Langlois is the owner of a line of hacks, vehicles, and carriages, with which he is engaged in carrying passengers in and about the city of Butte, and to and from the station and trains of plaintiff, and that the other defendants named are in his employ as drivers of said hacks, carriages, etc. But the defendants deny that they, or either of them, ever in any manner interfered with the said plaintiff in the conduct of its said railroad or passenger business at South Butte, or elsewhere, or that they, or either of them, interfered with the comfort or convenience of passengers of plaintiff at said station.

The defendants further allege that plaintiff never had any contract with any of its passengers to carry or transport them further than its said station at South Butte, and that plaintiff's contracts for transportation of its passengers to said station ends and is fully executed when such passengers are landed on said platform, and that all such passengers are obliged to procure and pay for their transportation from said platform to the city of Butte, or elsewhere; that the defendants, in their conduct in running their line of hacks and carriages for the transportation of passengers and baggage to and from the said station, have always conducted the same in a quiet and orderly manner, and have not gone upon the platform of plaintiff, nor solicited nor annoyed plaintiff's passengers, but have driven their hacks and carriages up to said platform on the west side of said station, and stood them there to receive and carry any and all such passengers as might wish to employ them so to do; that they never have at any time interfered, nor attempted to interfere, with the hacks of

said Lavell Brothers at said station; that defendants have only driven their hacks up to said platform when there was a vacancy thereat, and had only refused to remove their hacks therefrom to make way for the hacks of said Lavell Brothers.

The defendants further allege that the portion of plaintiff's platform which is west of the said passenger station, as described in plaintiff's complaint, is the portion of the platform where passengers alight from plaintiff's trains at said station; that the portion of the said platform east of said station building which plaintiff alleges it offered to allow defendants to drive their hacks to for the purpose of landing and receiving passengers is used almost entirely for handling freight and baggage, and the ground alongside thereof is always used by baggage and freight wagons; that if said Lavell Brothers are allowed the exclusive use of said platform west of said station-house, it will give the said Lavell Brothers the entire control of the business of carrying passengers from the said station, to the discomfort, inconvenience, and detriment of said passengers, and to the injury and destruction of defendants' passenger-carrying business from said station; that defendants have not in any manner interfered with or hindered the plaintiff or Lavell Brothers in the handling or transportation of the United States mails over said railroad, or from said station to the post-office in the city of Butte, or elsewhere; but have always allowed and conceded to the said plaintiff and to the said Lavell Brothers sufficient ground and space at and against said platform for the use of said Lavell Brothers' baggage wagon, omnibus, two carriages or hacks, and their wagons used in carrying United States mails, without any interference or hindrance from defendants, or either of them.

The defendants deny that if said acts of defendants complained of be allowed to continue, the plaintiff will thereby suffer irreparable injury, or any injury whatever, or that if defendants continue said acts complained of, they will hinder, prevent, or delay the plaintiff in its business. And the defendants allege that it is not for the convenience of plaintiff's business that it has entered into said contract with said Lavell Brothers, as alleged in said complaint, but for the purpose of giving said Lavell Brothers an undue advantage over these defendants and other hackmen in the said passenger-carrying business from said station, and to exclude defendants and other hackmen from any competition in said business.

The foregoing facts are substantially the allegations of the

complaint and answer respectively. No other pleadings were filed. Final hearing of the cause was had upon the facts set forth in the complaint and answer, and determined in the court below by an order setting aside the temporary injunction and denying the relief prayed for by plaintiff, from which order plaintiff appealed.

The whole question involved in this controversy is compassed by the proposition, on the part of the plaintiff, "that it is the owner of said grounds, depot buildings, and platform, and that it may regulate the use of said platform as it desires, provided the traveling public is not inconvenienced; that it may, if it desires, engage in carrying passengers in hacks to and from its trains; that if it was so engaged, it would have the right to its own property for such purpose; that if it has such right, it can as well employ Lavell Brothers with hacks to do such service as to own the hacks; that if the plaintiff has the right to its platform, it has the right to sell that right to Lavells for a valuable consideration," and should be protected in the exercise and benefits of these rights.

These propositions are controverted by defendants, in so far as they affirm the right of the plaintiff to grant exclusive use of a portion of said platform to one party to approach and occupy the same to convey passengers thereto, and receive passengers therefrom, and exclude all others from so doing.

No complaint is made that any reasonable rule or regulation made by plaintiff for the government of its depot platform or grounds has been violated, or that defendants have committed any act which interferes with the transaction of plaintiff's business, except in so far as defendants interfere with the exclusive use of said portion of plaintiff's platform granted to Lavell Brothers.

In respect to the delivery of the United States mail matter at said platform, and transportation thereof to the United States post-office in the city of Butte, it is admitted that ample space for that purpose is left to the use of the company and its employees, according to its requirements.

The question of handling the United States mail matter, it seems, is incidentally brought into this controversy, the transfer of this mail matter for the plaintiff being principally the consideration performed by Lavell Brothers for the grant of exclusive use of the designated portions of the railway platform to them, at which place Lavell Brothers may ply for passengers to patronize their hacks and carriages. If the

plaintiff has the right to grant the exclusive use of its platform in the respect mentioned, it may be granted for any other valid consideration as well. It is not denied that a railway company may make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. It is highly proper and beneficial to all concerned that this be done. The law recognizes this right on the part of the common carrier, and the courts enforce it. Upon this point the learned counsel for appellant cites many authorities, with which this court agrees. But we conceive that the matter under consideration is a far different proposition. The grant of a special privilege to Lavell Brothers to use the specified portion of plaintiff's platform at said station, and the exclusion of all others from approaching thereto to land or receive passengers, is not a rule or regulation in the common acceptance of those terms as used in the legal authorities and applied to this subject.

We therefore find in the numerous and valuable authorities cited on that theory only general aid in solving this controversy.

A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination in its requirements. This controversy must be solved by a consideration of the mutual rights of the appellant as a common carrier, and its passengers.

All passengers in common are entitled to equal opportunities and conveniences of place to approach and depart from plaintiff's trains. At the station mentioned, the railway company either commences or terminates its engagement to transport its passengers to and from said station, as the case may be. The contract of the railway company does not require that it either furnish conveyance to bring the passenger to said platform, or transport him therefrom. The passenger may employ whom he desires to bring him there for the departure on plaintiff's trains, or to meet and receive him on his arrival at said station. But the plaintiff contends that it may grant the exclusive use of a large portion of its platform to one party, at which to land passengers for departure on said trains, or to receive passengers from said trains; and if the passenger is willing to contract with this one party for transportation thereto or therefrom, such passenger may have the convenience of landing or departing from that portion of said platform; otherwise, he must land fifty feet away from said platform, or go to

another portion of the platform, encumbered with express and baggage wagons, and the handling of freight and baggage matter.

Suppose a passenger travels every day from this station, and returns, he is entitled to the same convenience and facilities for approaching and leaving this depot as other passengers.

If he contracts with another than Lavell Brothers, or the party to whom the railway company has granted the exclusive use of said portion of the platform, to bring him there and be there to receive him on his return, he must alight from his carriage or be received by it fifty feet away from said platform, or be landed where the express and baggage matter is handled, while the passenger who employs Lavell Brothers for the same purpose may land at and depart from this convenient portion of said platform. Or if a party desired to use his own carriage to bring him to said station or receive him on his return, it seems the same conditions would prevail.

Certainly, if the plaintiff has the right to grant the exclusive use of said platform to one, and exclude the public hackmen therefrom, it would apparently have the right to exclude the private hackmen therefrom. To the strong it would perhaps make no difference as a matter of convenience, just where they were landed at or received from said station; but to the feeble and the helpless, and those encumbered with their care, it would be a matter of great discomfort and inconvenience.

Still other conditions which directly result from the position demanded by plaintiff, and which militate against the equal rights of passengers, may be suggested.

Suppose all other hackmen who desire to compete with Lavell Brothers for the carrying of passengers to and from this depot will perform the service for half the sum charged by Lavell Brothers,—are the passengers entitled to the benefit of this competition? Has not the passenger the right to call these other hackmen to his service, and if he does call them, has he not a right to have such other hackmen approach the platform at the same place, or at least have an equal and common chance to approach at this same convenient place as his co-passenger who employs Lavell Brothers? If any of the passengers do accept these better terms, they must suffer the discrimination of being denied a landing at that portion of the platform granted exclusively to Lavell Brothers, or when they alight from plaintiff's trains they either go fifty feet away from

that portion of said platform, or to the east side of the depot building, for transportation with a hackman at the lesser rate.

It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff such as to stifle the natural development of such competition?

It is alleged by the plaintiff that by its arrangement with Lavell Brothers the latter engage to have a sufficient number of hacks and carriages at the arrival of all passenger trains to transport such passengers to the city of Butte from said station. But the plaintiff does not contract to carry its passengers destined to said station beyond that point, nor to see that such passengers are provided with transportation beyond that point. The plaintiff simply undertakes to reap a benefit from the necessity of its passengers to procure on their own account, and from such party, and on such terms as they may, transportation to the city. This benefit is sought to be denied by the plaintiff, from a grant of the most favorable portion of the platform where plaintiff sees fit to land its passengers, exclusively to one party, to solicit their patronage, and for this grant such party aids plaintiff in carrying out its contract to deliver the United States mails at the post-office in the city of Butte.

On principle, we cannot reconcile these conditions which are demanded by appellant with the rule that all who come to take passage, or who arrive at the station of a common carrier, are entitled to equal convenience and opportunity to approach said station or depart therefrom. It seems to us that the direct effect of appellant's position is to say to its passengers, "You must employ Lavell Brothers, or suffer certain inconveniences in taking passage with another."

These observations are not to be confounded with the question as to whether the railway company may not exclude all hackmen from its station buildings, or even from the platform, or set bounds on its grounds beyond which they should not come, as the exigencies of the situation and business might reasonably require, or to make and enforce any other reasonable rule as to the government of its depot buildings and grounds. It is not a general question of that character which here engages the consideration of the court.

The constitution of this state, article 15, section 7, provides

that "no discrimination, in charges or facilities for transportation of freight or passengers of the same class, shall be made by any railroad or transportation or express company between persons or places within the state."

The reported cases involving like or similar facts as the one at bar which have come to our attention are few in number. The recent case of *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, is the nearest in point. The facts involved in that case are quite similar to the case at bar, although it appears, from the statement of facts and the opinion, that while exclusive grant was made by the railroad company to Porter and Sons to come upon the depot premises to solicit passengers and baggage for transportation, and all other hackmen were forbidden to come there for that purpose, still, all hackmen were allowed equal privileges to come to the station to deliver passengers and baggage, and to receive such as they had a previous order for.

While we concur in the general principles of law applicable to common carriers, announced by the majority of the nearly evenly divided court in that case, we cannot subscribe to the conclusions drawn by the majority. On the contrary, after a careful consideration of that case, we are inclined to adopt the reasoning and conclusion of the dissenting opinion delivered by the three minority judges. The majority opinion in that case very clearly and forcibly states the general principles of law governing common carriers applicable to the present consideration. The court says: "The plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the station, and holds it for that use, and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations, but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them."

We do not find it consonant with reason, based upon those general propositions, to draw the conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to

some place beyond, and there introduce them to one favored party, saying, "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform, without delay or inconvenience, provided you will engage this particular party, and pay his demands; otherwise you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage."

All this the railroad does, not for a benefit to the passenger, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad.

If the railroad company set bounds beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others, for employment, this would be an entirely different proposition. The company does not undertake to protect the passenger from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this.

In the case cited *supra*, the majority of the court bases its conclusion on the ground that the hackman has no right or license to be in plaintiff's depot without the express or tacit permission of plaintiff, and this license, if granted, may be revoked at pleasure. We may grant this premise. The right which the railroad has to exclude all hackmen from its depot buildings and platform may rest upon the same principle. But has the railroad company, in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that if the passenger obtains the use of these conveniences and facilities he must purchase the privilege from such hackman or suffer discrimination? The use of these common conveniences and facilities belong to the passengers alike in the order in which they may come to occupy them; whereas, the railroad company has granted away what belonged to the passengers in common, and the one holding the grant may use it as an advantage over the passenger to compel his employment.

It is said in the opinion cited *supra*: "If a railroad com-

pany allows a person to sell refreshments or newspapers in its depot, or to cultivate flowers on its station grounds, the statute does not extend the right to all persons." Upon this proposition it might be suggested that the passenger has no common interest or rights which meet and intermingle with the rights of the common carrier on this subject, or which are affected by such a grant. The same reply may be made, we think, with good reason, to the proposition as to a place to serve refreshments on the premises of the plaintiff. The passenger has no common rights which are taken away or interfered with by the company in this respect. It is true, the passenger's necessities may require that he have food at proper times on his journey. But all passengers have an equal right to provide supplies, under regulations which apply to all alike as to the amount of baggage allowed to each. Moreover, this question has no relation to the mutual engagements existing between the common carrier and its passengers. The passenger has purchased, or proposes to purchase, from the common carrier, transportation, and he must come to the station to receive such transportation, and on arriving at his destination, he must depart from the station. The right to come to the station and depart therefrom, under reasonable regulations which apply alike to all passengers without special conditions, is incidental to the main contract, while the supply of refreshments or newspapers, or the cultivation of flowers at the station grounds, has, as we conceive, no appropriate connection with the engagements of the passenger and the common carrier. The case cited *supra* is the only American case brought to our attention which passes upon points directly involved herein. The subject is apparently a new one in this country. The English cases involving the main subject of controversy are also few in number.

In the case of *Marriott v. London and Southwestern R'y Co.*, 1 Com. B., N. S., 499, the complainant, Marriott, alleged that he brought passengers to defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other omnibuses, and upon this showing an injunction was granted. Other English cases bearing upon the main subject here under consideration have been examined: *Beadell v. Eastern Counties R'y Co.*, 5 Com. B., N. S., 509; *Painter v. Lord Brighton and S. C. R'y Co.*, 5 Com. B., N. S., 70; *Barker v. Midland R'y Co.*, 18 Com. B. 46. The demands in the case at

bar, on the part of plaintiff, go beyond those urged in any of the cases so far examined by us.

Upon grounds of sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of our constitution, we believe the order of the court below ought to be affirmed, and it is so ordered.

THE CASE OF *Cravens v. Rodgers*, 101 Mo. 247, lays down the rule as it is decided in the principal case. In that case, the owner of an omnibus transfer line constructed an approach to the railroad platform under a parol understanding and agreement with the company's agent to the effect that he should have the exclusive use of such approach. The agreement was decided to be against public policy, and in contravention of the spirit of article 12, section 23, of the Missouri constitution, which prohibits "discriminations in charges or facilities in transportation . . . between transportation companies and individuals, or in favor of either." But in *Old Colony etc. R. R. Co. v. Tripp*, 147 Mass. 35, 9 Am. St. Rep. 661, it was determined that a railroad company might grant to a person the exclusive privilege of coming upon its grounds to solicit patronage of incoming passengers, and might also exclude all others from the exercise of such privilege, notwithstanding the provision in the general statutes of that state that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise, or other property, upon its railroad, and for the use of its depot and other buildings and grounds." Compare *Barry v. Oyster Bay etc. S. S. Co.*, 67 N. Y. 301; 23 Am. Rep. 115.

RAILROAD COMPANIES — RIGHT TO EXCLUDE PERSONS FROM STATION AND STATION GROUNDS. — A railroad company may exclude innkeepers or hotel-runners from coming upon its platform to solicit custom: *Commonwealth v. Power*, 7 Met. 596; 41 Am. Dec. 465; *Landrigan v. State*, 31 Ark. 50; 25 Am. Rep. 547; and may remove any one from its station-house who does not intend to become a passenger upon its train, if after request he refuses to depart: *Harris v. Stevens*, 31 Vt. 79; 73 Am. Dec. 337. So a company may exclude competing vehicles from the habitual and continuous use of its track: *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 33 N. J. Eq. 267; 36 Am. Rep. 543; but a hackman is always entitled to access to the baggage-room, when he holds a baggage-check, and is seeking for the baggage: *Summitt v. State*, 8 Lea, 413; 41 Am. Rep. 637.

HEYFRON v. MAHONEY.

[9 MONTANA, 497.]

BALLOT WITH NAME OF CANDIDATE MISPELLED, TO BE COUNTED WHEN. —

A ballot containing the name "Dan Heyfron" should be counted for "Daniel J. Heyfron," where it is shown that he was a candidate for the office for which such ballot was cast, and that he was the only person having that surname within the county.

FAILURE OF JUDGES OF ELECTION TO TAKE OATH NOT GROUND FOR REJECTING RETURNS. —

Where there have been a fair vote and an honest count, the returns of an election precinct should not be rejected because the judges of election were not sworn.

CHANGING PLACE OF VOTING RENDERS ELECTION VOID WHEN. —

Where an election is held at a place more than three miles from the place designated by the county commissioners, the election at that precinct is void, and the vote cast thereat should not be counted.

ILLEGAL VOTES MAY BE APPORTIONED WHEN. —

Where a certain number of illegal votes are shown to have been cast at a particular precinct, if there be evidence to justify it, the court may apportion the illegal votes, and deduct them from the whole vote received by each party to the contest, in the proportion that the vote of each bore to the whole vote cast at the precinct, although the entire vote of the precinct might have been properly excluded.

STATEMENT OF ELECTION CONTEST MAY BE AMENDED DURING TRIAL OF THE

case, by correcting the names of persons and adding other names, to make it conform to the proofs.

SUBPENA ADMISSIBLE IN EVIDENCE IN ELECTION CONTEST WHEN. —

A subpoena issued to certain alleged illegal voters, with the return thereon showing that the persons named therein could not be found, is admissible in evidence as tending to show a proper effort on the part of the party at whose instance it was issued, to produce to the court the best evidence.

ELECTION contest. The opinion states the case.

Woody and Webster, for the appellant.

Word and Smith, for the respondent.

BLAKE, C. J. At the general election, held November 6, 1888, Daniel J. Heyfron was the Democratic and Cain B. Mahoney was the Republican candidate for the office of sheriff of the county of Missoula. The official canvass of the returns from all the precincts showed that Mahoney had received 1,843 votes and Heyfron 1,797 votes, and the certificate of election was delivered to the first-named person. Heyfron then initiated this contest by filing with the county clerk his statement, which sets forth many grounds under the provisions of the statute: Comp. Stats., div. 5, secs. 1043, 1044. Mahoney interposed a demurrer, which was overruled, and thereupon answered, and Heyfron filed his replication. The cause

was tried by the court without a jury, and the evidence which was offered by the contestant related solely to the precinct at Bonner, where Mahoney had 171 votes and Heyfron had 51 votes. No testimony was introduced by Mahoney, and the court made its findings of the facts from the pleadings and the evidence, and adjudged that Heyfron was entitled to the office. The motion of Mahoney for a new trial was overruled, and an appeal was taken to the supreme court of the territory of Montana. The transcript does not contain any request for a finding in writing by the parties, and we will examine the errors which have been assigned.

It is admitted by the pleadings that six ballots were cast at the precinct of Noxon with the name of "Dan Heyfron" for the office of sheriff upon them; that the contestant was the only person having this surname within the county of Missoula; and that the board of canvassers did not count the same for the respondent. The statute requires that "the district court shall hear and determine in such manner as shall carry into effect the expressed will of a majority of the legal voters, as indicated by their votes for such office, not regarding technicalities, or error in spelling the name of any candidate for such office": Comp. Stats., div. 5, sec. 1044. It was therefore properly ordered that these votes should be counted for Daniel J. Heyfron for said office.

The court further finds "that the whole vote returned by the canvassers from O'Keefe precinct, being twenty-eight votes for contestee, Cain B. Mahoney, and twelve votes for contestant, Daniel J. Heyfron, be excluded or thrown out and disregarded in making up the sum total of votes cast in the county for said office of sheriff." The statement of the contestant upon this ground is as follows: "Because, at the voting precinct known as 'O'Keefe,' the election was not held at the place designated by the county commissioners for holding the election, and because the judges who held such election were not sworn. The place designated by the county commissioners was the house of one Blanchard, and the election was held at Evaro, more than three miles distant from the place designated by the commissioners." The answer does not deny these averments, but alleges the reasons for the opening of the polls at Evaro; that one of the judges who had been appointed, and had in his possession the poll-books and ballot-box, notified the persons at Blanchard's house of this change; that every citizen who lived in the vicinity voted;

and that no one was prevented by this removal from voting; and that the election held at this precinct was conducted honestly, and according to law. The replication controverts these reasons, which are matters regarding the convenience of voters, the size of Blanchard's house, and the quantity of whisky therein on the day of the said election, and "denies that all the voters of said precinct of O'Keefe had an opportunity to vote at said election." No evidence upon this point appears in the record, and we must be governed by the pleadings, which confess the specified facts in this ground. "Previous to votes being taken, the judges . . . shall take and subscribe the . . . oath": Comp. Stats., div. 5, sec. 1015. The statutes provide for the holding of elections "in the several counties, townships, or precincts in this territory"; that the board of commissioners of the counties shall set off and establish "townships or precincts, when the same may be necessary"; that the clerk of the board "shall, at least thirty days before any general election, make out . . . three written notices for each township or precinct, said notices to be, as near as circumstances will admit, as follows: Notice is hereby given that . . . at the house of —, in the county of —, an election will be held"; that these notices shall be posted in the township or precinct, "one at the house where the election is authorized to be held"; and that the form of entry in the poll-books, "as near as circumstances will admit," shall be as follows: "At an election held at the house of A B, in the township or precinct of —": Comp. Stats., div. 5, secs. 1009, 1011, 1013, 1014, 1030.

We cannot ascertain, from the transcript, the views of the court below upon the objections of the contestant to the returns of the O'Keefe precinct. That which is founded upon the failure of the judges to be sworn cannot be sustained. In *Wells v. Taylor*, 5 Mont. 208, Mr. Chief Justice Wade, as the organ of the court, said: "The question is, Was there a fair vote and an honest count? If there was, the election is valid, though the officers conducting the same were not duly sworn or chosen, or did not possess the qualifications requisite for the office." And see the cases there cited.

What, then, was the legal effect of the removal of the polling-place more than three miles from the house of Blanchard to Evaro? Mr. McCrary, in his work on elections, writes: "It must be conceded by all that time and place are of the substance of every election, while many provisions which apper-

tain to the manner of conducting an election may be directory only": Sec. 141, 3d ed. The same opinion is expressed by Mr. Paine in his treatise on elections. "The requirement that the election shall be held at the place designated by law is not directory; it is mandatory, and must be obeyed": Sec. 327. In *Knowles v. Yates*, 31 Cal. 92, the court says: "Sullivan's house, which was three miles from the warehouse, was the place designated by the board of supervisors, and the fact that a copy of the proclamation was posted upon the warehouse is not sufficient to overcome the direct and positive evidence that Sullivan's house was the place designated. The conduct of the persons acting as officers of the election, in opening the polls and holding the election at a distance of three miles from the place appointed by the proper authority, was without any just excuse, and unauthorized, and in that respect was, in the sense of the statute, misconduct." In *Melvin's Case*, 68 Pa. St. 338, Mr. Chief Justice Thompson says: "A fixed place, it seems to me, is as absolutely a requisite, according to the election laws, as is the time of voting. The holding of elections at the places fixed by law is not directory; it is mandatory, and cannot be omitted without error. I will not say that in case of the destruction of a designated building on the eve of an election, the election might not be held on the same or contiguous ground as a matter of necessity, — *necessitas non habet legem*. But then the necessity must be absolute, discarding all mere ideas of convenience. . . . To move the place of election three miles from that designated by law, or from a village and across a considerable stream a half a mile or more distant from the village where it ought to have been held, or from a designated school-house to a vacant house more than a half a mile distant therefrom, without authority or any absolutely controlling circumstances, must render the election therein void, and if the votes taken be counted, constitute an undue election." See also McCrary on Elections, 3d ed., secs. 123, 124; Paine on Elections, secs. 327-330. The circumstances which do not affect the result when the place designated for the holding of the election has been changed are shown in *Preston v. Culbertson*, 58 Cal. 209, wherein the court holds: "The polls were opened a short distance from and in plain view of the place appointed, the owner of the house selected having objected to the election proceeding at his house; and it does not appear that any voter was misled or deprived of his vote by reason of

the change": *Dale v. Irwin*, 78 Ill. 180. There was no error in the action of the court respecting the returns from this precinct.

The third and last finding is as follows: "That at the precinct at Bonner sixty-six illegal votes were cast for said office of sheriff, and which said number of votes are to be deducted from the whole vote of said precinct for said office; that said sixty-six illegal votes be apportioned to and deducted from the whole vote received by contestant, Daniel J. Heyfron, and contestee, Cain B. Mahoney, at said precinct of Bonner, in the same proportion that the vote of each of said parties bears to the whole vote cast at said precinct, to wit, fifteen votes from the vote of contestant, Daniel J. Heyfron, and fifty-one votes from the vote of contestee, Cain B. Mahoney, leaving one hundred and twenty votes cast for Cain B. Mahoney at said precinct, and thirty-six votes cast for contestant, Daniel J. Heyfron, at said precinct." It is the contention of the appellant that there is no testimony to prove that sixty-six or any other number of illegal votes were cast at this precinct for him for the office of sheriff, or for the office of sheriff. The statement of contest alleges that 120 "men who were not legal voters of the county of Missoula voted for said Cain B. Mahoney for sheriff." After giving a list of the names, the eleventh ground concludes: "Not one of the said men had been in the county of Missoula thirty days preceding said election, not one of them had been in the territory of Montana six months preceding said election, and every one of them voted for Cain B. Mahoney at said election, and were counted for him by said board of canvassers." Another ground in the statement concerning some of the persons who voted for Mahoney for said office is stated thus: "No one of whom had legally declared his intention to become a citizen of the United States prior to said election; no one of said persons went to the office of the clerk of the district court to make said declaration; but the deputy of said clerk left his office, and took the declaration of each one of said persons in the county, at a distance from his office, and that was the only declaration of such intention any one of them made." The finding of the court is general; the illegal voters are not named or otherwise identified, and the nature of the disqualification is not pointed out. There is no proof, outside of the official returns, that any ballots were cast for Mahoney or Heyfron. While we do not deem the evidence clear or satis-

factory, there is testimony which tends to prove that laborers upon a railroad in the vicinity of the precinct at Bonner voted at this time, and that they had not resided in the county of Missoula thirty days before that election. The rule is settled by this court that the finding is like the verdict of a jury, and, under the circumstances appearing in the record, cannot be disturbed. We refrain, therefore, from an examination of the other ground, affecting the illegality of voters of foreign birth.

The appellant relies upon *McDaniels's Case*, *Brightly's Leading Cases on Elections*, 249, where it is said: "But if the individual do not know for whom he voted, and the fact cannot be established by other evidence, then the complaint must fail for want of proof, like any other cause which is lost for want of sufficient evidence to sustain it." This case, however, related to the illegality of only one voter, whose ballot would decide the contest, and the opinion states correctly the law which is applicable to the facts of that controversy, but has no bearing upon the question before us. Mr. McCrary says, in his work on elections: "But it does not follow that such illegal votes must necessarily be counted in making up the true result, because it cannot be ascertained for whom they were cast. In purging the polls of illegal votes, the general rule is, that unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. Of course, in the application of this rule, such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each": *McCrary on Elections*, 3d ed., sec. 460. He continues: "Let it be understood that we are here referring to a case where it is found to be impossible, by the use of due diligence, to show for whom the illegal votes were cast": Sec. 462. Mr. Paine, in treating this subject, writes: "Where illegal votes have been cast, the true rule is to purge the poll by first proving for whom they were cast, and thus ascertain the real vote; but if this cannot be done, then to exclude the poll altogether. This is safer than the rule which arbitrarily apportioned the fraud among the parties": *Paine on Elections*, sec. 513. Under the authorities, it was proper for the court to exclude the entire vote of the precinct of Bonner, or apply the rule of apportionment to the facts. In either event, the same judgment would be entered against the appellant. While it may be the safer

rule to reject the whole vote of a precinct which is tainted by fraud or illegality, we cannot conclude that the court erred in pursuing a different mode to arrive at a like end. The result of the findings was to give Mahoney 1,776 votes, and Heyfron 1,788 votes, and the contestant was declared elected to the office in dispute.

During the trial, Heyfron obtained leave to amend his statement of contest to conform to the proof by changing the following names, which are specified in the aforesaid eleventh ground, to wit: "William McCarthy to read William McGarry, W. Bugg to read N. Berg, Louis Gunther to read Louis Guenter, Wade Beck to read Wade Beach," etc. Eight names were also added to the list therein. The appellant insists that the court erred in allowing these amendments to be made. Mr. McCrary says: "It may be stated, as a general rule recognized by all the courts of this country, that statutes providing for contesting elections are to be liberally construed, to the end that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections. Immaterial defects in pleadings shall be disregarded; necessary and proper amendments should be allowed as promptly as possible": McCrary on Elections, 3d ed., sec. 396. "In most of the states of the Union there are statutes to regulate pleadings, under which courts are authorized to allow amendments where petitions or other pleadings are found to be defective, and under most of these statutes a petition in a contested election case may be amended. In the absence of any statute of this character, the court trying a case of contested election may, under its general common-law power, permit such a petition to be amended; and an amendment ought to be allowed whenever the court, in the exercise of a sound discretion, shall be of opinion that the ends of justice will be thereby promoted": McCrary on Elections, sec. 406. This author continues further: "If, therefore, an amendment of a petition would necessarily result in a continuance, or in considerable delay, it ought not to be permitted; because it is better that he whose fault it is that the original petition is insufficient should suffer, than that an innocent party should be deprived of his right to a speedy trial. In such a case, the furtherance of justice requires that leave to amend should be refused": McCrary on Elections, sec. 407. In *Election Cases*, 65 Pa. St. 34, the court says: "And in point of reason, why should the court not have power to

amend in a contested election case? It is a judicial remedy, and concerns important rights. . . . It would be an intolerable technicality if the petitioners were required to set forth in their complaint, within ten days after the election, every illegal vote, every illegal act of the election boards, and every instance of fraud. Such a nicety would prevent investigation, and defeat the remedy itself": See Paine on Elections, secs. 827, 840, and cases cited. We have upheld in a liberal spirit the action of courts in permitting amendment to pleadings, and executing the provisions of the Code of Civil Procedure. Under the authorities, this principle embraces election contests. The effect of the first amendment was to correct the spelling of the names of persons, who could have been distinguished by the court without this change. The addition of the other parties was not sufficient to control the judgment. The appellant did not allege that he was surprised by this ruling, or ask for a continuance, and we do not think the court abused its discretion in this matter.

The court received in evidence a subpoena issued out of the office of the clerk of the court below in December, 1888, with the return of the coroner thereon, showing that he was unable to find 118 persons therein named. They comprise the names of the voters in the precinct of Bonner, against whom the contestant preferred the charge of illegality. The subpoena and return are *prima facie* evidence of some matters which are connected with the case. They tended to prove that the contestant made a proper effort to secure the attendance of these witnesses, and explained his failure to produce them upon the trial, and enabled the court to understand the cause of the omission to bring before it the best evidence. Considered from any stand-point, we cannot see how their introduction prejudiced the appellant.

The judgment is affirmed, with costs.

In *Lloyd v. Sullivan*, 9 Mont. 577, the following points were decided: 1. The supreme court has jurisdiction of an appeal from an order of the district court refusing a motion for a new trial in an election contest. 2. Allegations in a statement of contest in an election case that the county clerk, disregarding his duty, issued a certificate of election to the respondent, claiming, in support of such illegal action, to have knowledge of the return of a large number of votes for respondent from a particular precinct, which return had not been included in the abstract of votes, and which votes, had they been so returned, would have given respondent the highest number of votes for the office, and that there were no legal returns from that precinct, denied by the respondent in his answer, raise issues which involve the ques-

tion of the validity of the returns from said precinct. 3. Election returns of a precinct are fraudulent, and do not truly state the vote which each candidate for office received, where it is shown that the election at such precinct was conducted by three judges instead of by five, as required by law; that the clerks selected to serve performed no clerical duties, but signed the returns on the second or third day after the election; that the canvass of the votes was conducted privately, and not in public, as required by law, several persons being ejected, and others, who sought admittance, having found the doors locked; that the certificate of the returns was certified by the judges and attested by the clerks, instead of being certified by the clerks and attested by the judges; that the poll-book showed that after the judges and clerks had voted, the entire remainder of 169 electors cast their ballots in alphabetical order, and that every elector voted for a candidate for every office, and for or against the constitution, while the evidence showed that all the electors did not vote for or against the constitution, that one elector did not vote, though his name was on the poll-book as having voted, that some electors did not vote for certain candidates, and some votes were returned for candidates other than those for whom they were cast, that ballots were stamped by the judges after the polls were closed, and that the voters did not go to the polls in alphabetical order. 4. Subpoenas, with their returns duly verified, showing the names of voters at a particular precinct who could not be found, are admissible in evidence in an election contest to establish diligence on the part of the contestant in seeking to procure the best evidence (affirming the principal case). 5. Where fraud at a particular precinct is shown in an election contest, both by direct and circumstantial evidence, the entire vote of the precinct must be rejected. In such a case, the legal votes cast are not invalidated by the fraud, but the person claiming the benefit of such votes must prove them.

ELECTIONS — NAMES MISPELLED UPON BALLOTS. — In ascertaining for whom a disputed ballot was cast, if the voter's intention is found, such intention should not be defeated by the fact that the name of the candidate is misspelled, the wrong initials employed, or some other or slightly different name of like or similar pronunciation was written instead of that of the candidate intended to be voted for: *Brown v. McCollum*, 76 Iowa, 479; 14 Am. St. Rep. 228; *Gumm v. Hubbard*, 97 Mo. 311; 10 Am. St. Rep. 312, and extended note; *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349; *Wimmer v. Eaton*, 72 Iowa, 374; 2 Am. St. Rep. 250; *Attorney-General v. Colburn*, 62 N. H. 70.

ELECTIONS — IRREGULARITIES NOT VITIATING. — As to what irregularities may be committed by those who conduct an election and still not render the election invalid, see *De Berry v. Nicholson*, 102 N. C. 465; 11 Am. St. Rep. 767, and cases cited in note thereto.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

GILLILAN v. KENDALL AND SMITH.

[25 NEBRASKA, 82.]

CHattel Mortgage of Crops — RECORD AS NOTICE AFTER HARVESTING.

— The mortgagor in a recorded mortgage of a growing crop, if left in possession after it is harvested, possesses a beneficial interest in the property until foreclosure, and may pass a good title to one who purchases in good faith in open market without actual notice of the mortgage.

CHattel Mortgage — RECORD AS NOTICE. — A recorded chattel mortgage of growing grain is not notice of a mortgage on the same grain in a crib or bin, where it has been lawfully placed by the mortgagee, or by the mortgagor with his consent, so as to affect the title of an innocent purchaser, who has bought it of the mortgagor in open market without actual notice of the mortgage.

Sawyer and Snell, for the plaintiff in error.

C. E. Magoon and C. O. Whedon, for the defendants in error.

MAXWELL, J. This is an action by the plaintiff against the defendants, to recover for certain growing corn mortgaged by one Ashton to him, and a portion of which was gathered and sold to the defendants. On the trial, the plaintiff recovered for the amount due Ashton upon the corn so sold. The plaintiff contends that he is entitled to recover for all the corn sold by Ashton to the defendants, although they had already paid Ashton therefor.

The facts are substantially as follows: One Ashton gave two chattel mortgages to the plaintiff in error, to secure payment of three of his promissory notes, — one in the sum of

\$61.30, another in the sum of \$225, and the third in the sum of \$44.50, — which chattel mortgages covered the crop of corn which was growing upon the lands owned by the plaintiff, viz., the west half of section 30, township 11, range 5, in Lancaster County. These chattel mortgages were duly filed for record in the office of the county clerk on the third day of July, 1885, and the seventh day of September, 1885, respectively. During the months of November and December, in the year 1885, the said Ashton gathered and sold, without the knowledge or consent of Mr. Gillilan, a portion of the matured crop of this corn to the defendants, Kendall and Smith, who purchased the same in open market at their elevator in Malcolm, through their agent, John Carpenter. Kendall and Smith are grain buyers at Malcolm, and it was admitted at the trial that they had no knowledge of Mr. Gillilan's lien upon the corn so purchased by them, except such constructive notice as the filing of the chattel mortgage gave them.

The plaintiff introduced the notes in question, and the chattel mortgages securing the same, with proof that they were duly filed, and also testimony tending to show that the defendants had purchased from Ashton about 985 bushels of corn, and that such corn was worth, in the market at Malcolm, at the time stated, from nineteen to twenty-one cents per bushel. There is no testimony tending to show the entire quantity of corn produced by Ashton on the land of the plaintiff in section 30, nor what portion of the crop, if any, Ashton was to deliver to the plaintiff for rent. For aught that appears, the amount of corn still remaining on the farm is sufficient to satisfy the mortgages in question.

The court instructed the jury as follows: "A party taking a chattel mortgage upon growing corn, in order to preserve his lien as against innocent purchasers, is bound to see that when the corn is gathered such notice is given to the public of his lien, by keeping the same separate and unmixed with other corn, as will prevent innocent parties from purchasing such corn. And in this case, if the jury believe, from the evidence, that the plaintiff, after the execution of the mortgages offered in evidence by him, did nothing more than to file his mortgages in the office of the county clerk, and allowed the corn to become mixed with other corn, and if the jury further believe, from the evidence, that the defendants, without actual notice of the existence of these mortgages, purchased the corn, or some portion of it, at their elevator in the town of Malcolm,

in open market, then the plaintiff cannot recover, and your verdict will be for the defendants."

To this instruction the plaintiff excepted, and now assigns the same for error.

At law, a chattel mortgage passes the legal title in the property mortgaged to the mortgagee, although the mortgagor retains an interest in the property and may redeem the same at any time before a sale under a foreclosure of the mortgage. In other words, a chattel mortgage is a security in which the legal title to the property mortgaged passes to the mortgagee, but in which the mortgagor retains a beneficial interest. Necessarily, additional labor must be expended on a growing crop to harvest and care for the same. If the mortgagee intrust this labor to the mortgagor, he to that extent makes him his employee. If the entire property in the grain had passed to the mortgagee on the execution of the mortgage, then it would be the business of the mortgagee to gather and care for the crop, and if he failed to do so, it would go to waste. Where, therefore, the mortgagor remains in possession, and is permitted to gather the crop, it will be presumed that it was with the consent of the mortgagee. Now, suppose that the security is considerably more than sufficient to pay the debt secured, and is the principal means possessed by the mortgagor for paying ordinary debts, and the means, also, of feeding his stock, and that such mortgagor is feeding his stock from such grain, and selling portions of the same to meet his necessary expenses, and these facts are known to the mortgagee, or he has knowledge of facts sufficient to put him upon inquiry, he certainly cannot follow the grain, and compel the party who has purchased and paid for the same in open market, to again pay him for such grain; nor could he claim a lien upon the stock for the grain used to feed it. If the mortgagor was a farmer, and the grain mortgaged included all that he possessed, and it was the intention of the parties that he should continue in the use of the grain for feed or other necessary purposes about the farm, as before the execution of the mortgage, it would not be a breach of the condition to carry out such intention, and the consent of the mortgagee may be implied; and so that the security shall remain sufficient, the mortgagee would have no cause of complaint. A mortgage of growing crops does not necessarily imply a mortgage of the same grain gathered and placed in a granary or crib, at least so far as constructive notice to be derived from the filing of a mortgage

is concerned. The lien, as between the parties, continues, no doubt; but our statutes do not favor secret liens, and this court has so declared in a number of cases: *Edminster v. Higgins*, 6 Neb. 265; *Rhea v. Reynolds*, 12 Neb. 133. A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, when it has been lawfully placed there by the mortgagee, or by the mortgagor with his consent. If wrongfully or unlawfully removed, the rule probably would be different.

At common law, the purchaser of goods in market overt, if he acted in good faith, ordinarily was protected. Blackstone, volume 2, page 449, says: "But property may also, in some cases, be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise, all commerce between man and man soon be at an end. And therefore the general rule of the law is, that all sales and contracts of anything vendible, in fairs or markets overt (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the Mirror informs us, were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law, insomuch that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses."

It is not the policy of the law to extend the doctrine of constructive notice to cases where the change in an article mortgaged, made with the consent of the mortgagee, will fail to put a purchaser upon inquiry as to a claim held by him on the property. Thus a mortgage of clay in the bank would not be notice to a purchaser of brick manufactured from such clay; nor of wool growing upon sheep, of a lien upon the cloth manufactured therefrom. If the cases supposed differ from that under consideration, it is only in degree. In the case at bar, a large amount of additional labor was required to husk and gather the corn and prepare it for market.

If the mortgage lien continues as notice to third parties after such change in the condition of the crop, why may not the mortgagee follow the grain to Chicago, New York, or in case of its shipment to England or France, to the ports of either country? No one will contend for such a rule; yet if the first

purchaser is chargeable with notice of a secret lien, why is not the second, third, or more remote purchaser? The more salutary rule, no doubt, is to require the mortgagee to look after his security, and if a change is made in its character, to see that his mortgage still imparts notice of his lien on the property, to third parties. If the owner of goods stand by and knowingly permit them to be sold as the property of another, he will be estopped from afterward asserting title thereto; and this rule would seem applicable to mortgages of personal property.

There is another reason why the plaintiff cannot recover in this case. There is no proof whatever that the mortgaged property in his possession is not ample to secure his claim, and on the evidence before us he is entitled to recover nothing; but no objection is made on that ground.

The grain in question was purchased in the open market. The mortgagor held an interest in the grain itself, and there being no sufficient constructive notice to third parties, could pass a good title by the sale. The defendants, therefore, were not liable, and the instruction is not erroneous. The judgment of the district court must be affirmed.

LIEN UNDER CHATTEL MORTGAGE ON GROWING CROPS, WHETHER CONTINUES AFTER SEVERANCE FROM THE LAND. — A chattel mortgage duly recorded upon a growing crop continues to be a lien thereon while in the possession of the mortgagor, but after severance and removal from the land, is generally held to continue as against purchasers from or attaching creditors of the mortgagor. This lien in favor of the mortgagee as against attaching creditors of the mortgagor is decided to exist in *Kimball v. Sattley*, 55 Vt. 285; 45 Am. Rep. 614; *Bank v. Crary*, 1 Barb. 542; *Rider v. Edgar*, 54 Cal. 127; *Hackleman v. Goodman*, 75 Ind. 202. As to the existence of the lien as against a purchaser from the mortgagor, it is decided in *Duke v. Strickland*, 43 Ind. 494, where growing wheat was mortgaged, and the mortgage duly recorded, after which the mortgagor, without the consent or knowledge of the mortgagee, harvested, thrashed, removed, and sold the wheat, the purchaser converting it to his own use by mixing it with other wheat, that the title to the wheat was vested in the mortgagee, that the recording of the mortgage was constructive notice to the purchaser, and that the mortgagee could recover its value of the latter, though he bought it in the usual course of trade, and without actual notice. So in *Muse v. Lehman*, 30 Kan. 514, under a recorded chattel mortgage of growing wheat, providing that it was to remain in the possession of the mortgagor until default, the mortgagor retained possession, harvested it, and after stacking it on the premises where it was grown, thrashed it, and after finding it to amount to eighty-four bushels, he put it into a bin on the premises, containing forty-two bushels of other wheat of the same quality. Afterward, and with the consent of the mortgagee, the mortgagor sold all the wheat on credit, intending that part of the proceeds of the sale should be applied to the payment of the mortgage

debt. Upon this state of facts, the court determined that the mortgage did not become void by reason of the changes in the mortgaged wheat, nor of the sale thereof, but that the mortgage remained valid, and the debt due from the purchaser for the wheat was due to the mortgagee, who had the right to recover it. In *Smith v. Jenks*, 1 Denio, 580, *Jencks v. Smith*, 1 N. Y. 90, a tenant executed a mortgage on six acres of growing grass, which he afterwards cut and stacked upon other land occupied by him, and after retaining it in his possession for several months, it was sold under execution against him. In an action by the purchaser against the mortgagee it was decided that the hay was subject to the mortgage, and that the sale under execution was void. Under the same rule, a mortgage of logs intended for sawing into boards binds the lumber made out of them: *White v. Brown*, 12 U. C. Q. B. 477. So the due registration of a mortgage on a growing crop of cotton in the county in which the land on which it was raised is situated is constructive notice, after the crop is harvested and baled, of the existence of the mortgage, to a purchaser in another county, so as to make him liable to the mortgagee: *Hudmon Bros. v. Du Bose*, 85 Ala. 446. A factor or commission merchant receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee, if the mortgage has been properly recorded in the county in which the cotton was raised: *Marks v. Robinson*, 82 Ala. 69. Section 2972, Civil Code of California, provides that the lien of a recorded mortgage on a growing crop is kept alive only so long as the same remains on the land of the mortgagor, and under this statute it has been decided that the mortgagee will lose his lien by leaving the grain, after it is cut and harvested, in the field, for ten days, without attempting to take possession, as against a *bona fide* purchaser from the mortgagor: *Goodyear v. Williston*, 42 Cal. 11; and where grain was seized under attachment three miles away from the land upon which it was raised, the court considered the attachment valid as against the mortgagee: *Waterman v. Green*, 59 Cal. 142. When, however, the crop is hauled to a warehouse by the mortgagor as the agent of the mortgagee, and there stored, it would seem that the lien is not lost: *Byrnes v. Hatch*, 77 Cal. 241. Nor is the lien created by a duly recorded mortgage on a growing crop destroyed by a tortious removal thereof from the land of the mortgagor, by a third person having constructive notice of the lien: *Wilson v. Prouty*, 70 Cal. 196.

OBERFELDER v. DORAN.

[26 NEBRASKA, 118.]

ELEVATORS — TENANT'S LIABILITY FOR DEFECTIVE CONDITION OF. — A tenant of a building in which a passenger-elevator is used by him in his business is bound to keep such elevator in a reasonably safe condition and in proper repair for the purposes for which it is used by his authority or direction, or by those entitled to use it; and he is liable for personal injuries received by his servant, who, while properly using it, is injured by reason of its unsafe condition and want of proper repair.

Lake and Hamilton, and A. J. Poppleton, for the plaintiffs in error.

J. T. Moriarty and J. C. Cowin, for the defendant in error.

COBB, J. This case is brought to this court on error from the district court of Douglas County.

The defendant in error filed her amended petition in the court below against the plaintiffs in error on January 2, 1888, alleging that on March 25, 1887, her husband, Bernard Doran, died, leaving a will appointing her sole executrix thereof, which will was duly proven, admitted to record, and letters testamentary were issued to her thereon; that she is the mother of Emmett N., aged eight years, Patrick J., aged five years, Martha E., aged three years, and Bernard M., aged two months, children of her said husband, deceased, upon whom she and her said children were wholly dependent for support, and in behalf of whom, as heirs at law and next of kin, she brings this suit; that on March 8, 1887, and for a long time prior thereto, the defendants were lessees of a four-story brick building, Nos. 1213 and 1215 Harney Street, in Omaha, in said county, and had control and management of the same, and of the elevator used and operated therein, in conducting their business of wholesale milliners and dealers in notions; that said elevator was attached to one end of a cable which passed over a large iron wheel, and was operated by machinery with which the other end of the cable was connected; that said wheel weighed about six hundred pounds, and was supported by wooden beams crossing diagonally from one side to the other of the shaft of the elevator, at a distance of about seventy-five feet above the cellar floor of the building; that it was the duty of the defendants to see that said wooden beams were composed of sound material, kept in good repair, and were of sufficient strength for the purpose for which they were used; but that said wooden beams consisted of four weak, decayed, and rotten pine boards, each of which was filled with from ten to fifteen knots, and all fastened together with nails and bolts; that the defendants carelessly and negligently permitted said beams to get out of repair by becoming decayed, rotten, and weak, and were of inadequate strength and wholly unfit for the purpose for which they were used, of all of which defects the defendants were at all times informed and had full knowledge, but of which the said Bernard Doran had no knowledge whatever; that on the eighth day of March, 1887, said Doran was, and for a long time prior thereto had been, in the employ of said defendants, and while so employed it was his duty to remove store-boxes and other material to and from the cellar floor and the several floors of the building, upon and by means

of the said elevator. And while the said Doran was so engaged at said work on said day, in the discharge of his duty, the said wooden beams, by reason of their condition and inadequate strength and general unsuitableness to the purpose used, gave way and broke into two pieces each, at the point where the axle of the wheel rested upon them, thereby causing the wheel to fall and be precipitated with force and violence down into the cellar floor of the building, falling upon and striking both legs of said Doran, breaking and crushing the bones, and bruising, tearing, and mangling the flesh thereof, by reason of which it became necessary to amputate both of his legs, one above the knee and the other immediately below it, which was done on said last-mentioned day. After receiving said injuries, and incurring expenses for surgical aid and nursing to the amount of two hundred dollars therefor, and experiencing pain and suffering till the twenty-fifth day of March, 1887, said Doran died, by reason of said injuries through the carelessness and negligence of said defendants, by reason of which the plaintiff and her said children have sustained damages to the sum of five thousand dollars, for which she prays judgment.

The answer of the defendants admitted the premises so far as the occupation of the building for the purposes alleged by the plaintiff, and that "there was an elevator in the building used for lowering and elevating persons, store-boxes, merchandise, and other material to and from the cellar floors thereof," but specially denied any negligence or carelessness charged against them, and further admitted that said Doran received some injury at the time and place alleged, and died, leaving a widow and three children, as alleged, but denied generally all other allegations of the petition.

There was a trial to a jury, with a verdict for the plaintiff, and judgment thereon. The defendants' motion for a new trial having been overruled, the cause is brought to this court on the following assignments of error: 1. In refusing to give instructions to the jury numbered 1, 2, and 6, requested by the defendants; 2. In giving instructions numbered 1, 3, 5, and 6, requested by the plaintiff; 3. In holding that the verdict was supported by sufficient evidence.

The instructions offered by defendants and refused by the court are:—

"1. The jury are instructed that the defendants had the right to assume that the elevator in question, when they took

the lease from Smith and entered upon their occupancy of the premises, had been constructed of sound material and in a workman-like manner; and even if the jury find from the evidence that the injury complained of was caused by the use of decayed or defective timber in the construction of the elevator, of which the defendants had no knowledge until after the injury, they are not liable in this action.

"2. The jury are further instructed that the defendants had the right to infer, when they entered upon and during the occupancy of the building in question, that the elevator therein and its supporting timbers were of suitable dimensions, and sound; and the fact that they did not examine the timbers, which finally broke, to ascertain their condition in these respects, nor call upon a mechanic or expert to do so, is not evidence of neglect or default on their part."

"6. And even although the jury may believe that an extraordinarily prudent or careful person, under the circumstances surrounding the defendants in their leasing and occupying the premises in question, might or would have made, or have had made by a carpenter or expert, an examination of the timbers supporting the elevator, for the purpose of ascertaining their condition and soundness, still, if ordinarily prudent persons under like circumstances would probably have done substantially as the defendants did, then they are not liable, and the jury should find a verdict in their favor."

Those given which are complained of are:—

"1. That the relation of master and servant exists whenever one person, under valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. The relation is one of contract, and the parties may stipulate for any kind of lawful service on any lawful condition. If, therefore, the jury believe from the evidence that the relation of master and servant existed between the defendants and Bernard Doran at the time he received the injuries complained of; that the injuries so received were caused by and through the carelessness and negligence of defendants; that said injuries were received while the said Doran was engaged in the discharge of his duties as the servant of the defendants, without fault or negligence on the part of deceased; and that he died by reason of the injuries so received,—then in that case you will find for the plaintiff."

"3. That it was the duty of the defendants to use reasonable diligence and care to have the elevator and its several

parts in a reasonably safe condition for the purposes for which they were used by authority or directions of defendants, and to keep the same in proper repair, so that the elevator might be used by those entitled thereto with a reasonable degree of safety, with proper care and caution, and without fault on the part of those using the same; and the defendants are not relieved from this duty from the fact that they may not have personally possessed the skill to determine whether the machinery was reasonably safe, or in reasonably safe repair."

"5. That if they find that the deceased, Bernard Doran, was properly using the elevator all the time of the accident, and that he came to his death by reason of the injuries received from the falling of the elevator or any of its parts, without fault on his part, and that the timbers which supported the wheels over which the cable passed that operated the elevator-car were palpably and plainly insufficient in strength, of improper and defective material, and the defendants had knowledge of such insufficiency of the timbers and other defects therein, or such insufficiency and defects had existed for such a length of time that by reasonable care and diligence, commensurate with the nature and use of elevator machinery, they could and would have had and possessed such knowledge, and ascertained the condition, and said timbers broke on account of such insufficiency and defects, causing the fall and injuries aforesaid, then, and in that case, the plaintiff is entitled to recover.

"6. The deceased had a right to assume without examination that said elevator and its several parts were in reasonably good condition and repair, and that it was reasonably safe to use the elevator in its proper employment."

The first point of contention by the plaintiffs in error is, that the relation of master and servant did not exist between the deceased and themselves. They do not attack the law as given to the jury by the court in the first instruction asked by the plaintiffs in error.

While, probably, there was evidence by which the jury could find that the relationship of master and servant existed between the deceased and the plaintiffs in error, under the law as given them by the court, and while I believe that the rule thus laid down is correct, I do not think it was necessary that the jury should pass upon that question in order to reach the conclusion which they did, as I do not conceive that an employer owes a higher obligation to his servant regard-

ing the safety and suitableness of the machinery which he is required to operate, or the ways and carriages by which he goes to and from his employment, than is due to other persons not servants or employees, who, upon his invitation, either expressed or implied, may use or be subject to the power and exigencies of his machinery, or may pass over such ways and carriages in pursuance of business, in accordance with invitation.

The next point is briefly stated by counsel, as follows: "In order to have reached the verdict rendered, the jury must have found that the plaintiffs in error were guilty of the negligence charged in the petition. There is not sufficient proof to establish such negligence, and hence the verdict is not sustained by the evidence."

The petition, after describing the elevator and the manner of its fall, further alleges "that the defendants carelessly and negligently permitted said beams to get out of repair, by becoming decayed, rotten, and weak, and were of inadequate strength, and wholly unfit for the purpose for which they were used." It will thus be seen that while it is not admitted by the petition that the beams of the elevator were originally sound, and fitted for the purpose for which they were intended, yet the allegation is, and the chief negligence charged against the defendants was, that they negligently permitted the elevator and its supporting beams to get out of repair, by becoming decayed and rotten, and insufficient for their purpose.

Freight and passenger elevators, and like mechanical contrivances for merchandise, factories, and hotels, are of modern use. Probably less than thirty years ago they were nearly unknown in this country. This is the first instance under my observation in which the question of the liability of the owner or tenants of buildings employing an elevator to any class of persons suffering injury by the use of it, has been mooted.

The lives and safety of guests at hotels, or the customers and employees of a mercantile store or factory, where an elevator is now in common use, must, in the very nature of things, constantly depend for safety upon the strength of the machinery, its fastenings and support, and the proper condition in which all parts are preserved, as well as upon the skill and fidelity of those intrusted with their management. A great degree of responsibility thus necessarily rests upon the

builders and owners of houses in constructing and leasing them with this improvement; but more especially is the responsibility upon tenants, to whose business operations it is made an important accessory.

Many of the cases cited by counsel for plaintiffs in error seem to have been brought forward to establish the liability for injuries similar to that at bar upon the landlord and owner of the premises, and not upon the tenant, lessee, and occupant. These cases, especially that of *Swords v. Edgar*, 59 N. Y. 35, *House v. Metcalf*, 27 Conn. 631, *Nugent v. Boston etc. R. R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151, are cases where actions were sustained against persons standing in the relation of landlord, and not of tenant or occupant. But I do not think that the premises and the logic of any one of these cases is such as to relieve the tenant or occupant from responsibility, or to establish the proposition that had the action been brought against him instead of his landlord, it could not have been maintained.

While it will be admitted that the same legal principles will govern a case brought for an injury caused by negligence in failing to keep in repair an elevator operated in a hotel or store that would apply to an action for injury for failing to keep in repair an engine or other machinery of railway transportation, or by failing to keep in repair the platform, guards, timbers, and supports of a public wharf, yet, in so far as there may be a difference necessarily growing out of the nature and use of these several kinds of improvements respectively, I think that the greater burden is thrown upon those responsible for the safe construction, good repair, and careful operating of a passenger-elevator. The kind of domestic use to which these improvements are applied, the apparently slight risk which presents itself to those who often risk their lives upon the sufficiency of an elevator, and the care with which it is operated in ascending and descending from one floor to another, are calculated to lull into a sense of security, without apprehension, and prevent inquiry and examination of the guest or customer into the construction, the condition, or the material of such machinery. Indeed, it may be said that all persons at hotels, stores, or buildings using elevators, if they do not "take their lives in their hands," they constantly intrust them to the fidelity and skill of the constructor and attendant of such machinery; and it may be answered that a like risk is involved in regard to our use of all the complex

conveniences of life. That such is true, to a considerable extent, is granted; but I know of no important experiment to save bodily labor and fatigue upon which the daily safety of individual life depends, and is so much endangered, as that of the passenger-elevator. And so it will be readily admitted that a rule of law would be objectionable which fails to designate the person or persons in every case whose duty it shall be to exercise proper care and bear the responsibility for the construction, preservation, and management of all passenger-elevators to the use of which the public are invited.

While I would not say that where a man who erects a building with an elevator negligently allows it to be unsafely constructed, and afterward lets it to a tenant, and while the same is so occupied, a servant, customer, or guest, or one of the general public, who has been expressly or impliedly invited to its use, is injured, without contributory negligence on his part, by reason of the unskillful construction or improper material of such elevator, an action for damages for such injury would not lie against the constructor or landlord, yet I do hold that in many if not in most cases it would amount to a denial of justice to establish a principle or rule of law that would confine and limit the remedy to an action against the builder or landlord. And I think that, in the very nature of things, such injured person has a cause of action against the person who controls the premises and profits by the business of which the elevator is a component part and accessory.

In the case at bar, the plaintiff introduced in evidence the contract lease of the premises from George Warren Smith, the owner, to the defendants, by which it appears that the defendants were, by the terms of their lease, to keep the premises, and especially the hydraulic elevator and all its connections, machinery, and pipes, in good order and state of repair, and free from all obstruction.

This evidence obviates the necessity of the discussion of the question of the direct primary liability of defendants, in case there be liability upon any one, for an injury sustained by reason of the defective state of repair of the elevator in question. And it appears that the authority of the cases cited by the defendants in error in the brief, and especially that of *Burdick v. Cheadle*, 26 Ohio St. 395, 20 Am. Rep. 767, establishes such liability of the defendants for damages sustained by reason of the faulty and imperfect original construction of the machinery.

Upon the trial, three pieces of timber were offered and received in evidence, marked exhibits Nos. 1, 2, and 3, and were examined and considered by the jury in making up their verdict. They were attached to and made a part of the bill of exceptions, were exhibited to the court, and commented upon by counsel in their argument of the case. These pieces of timber were identified on the trial by witnesses O'Donovan, O'Keef, and Jenkins (and their evidence was not denied) as being part of the beams upon which rested the boxes and journals of the wheel upon which ran the cable bearing the weight of the traveler or carriage of the elevator and its passengers and freight. The evidence of these witnesses tended to prove that the beams were constructed of an improper material, that the timber was unsound by reason of natural knots, which increased its liability to split and break, and that whatever may have been the condition of the lumber composing the beams when constructed, it was, at the time of the accident and injury to the deceased, utterly unfit for the purpose for which it was used, by reason of dry-rot and decay.

This evidence was fully corroborated by the examination of the timbers by the jury as well as by this court. The evidence and the examination tended also to prove that the faulty character of the beams, and their unsafe condition, shortly before the injury, were such that the true condition should have been detected by the inspection of a competent person.

It also tended to prove that such faulty condition of the beams "had existed for such a length of time that by reasonable care and diligence on the part of defendants, commensurate with the use of the elevator machinery, they could and would have had and possessed such knowledge, and ascertained the condition" of said timbers.

The verdict of the jury is therefore sustained by the evidence, and by the fifth instruction as given by the court at the request of plaintiff in the court below.

I cannot agree with counsel in their contention that the defendants were not obliged to make a proper examination and inspection of the timbers of said machinery, from time to time, to ascertain whether they were still safe and sufficient to do their work; but, on the contrary, am obliged to insist that it was their duty to make such inspection, whether the defects which led to the injury and loss of life were in the original construction, or whether incidental at a later period.

And, as above stated, there being evidence sufficient for the jury to find that the faulty character of these timbers was such that a proper inspection would have disclosed the same, it appears unnecessary to pass upon the question as to whether their duty to make such inspection would exist only where it is shown that such inspection would have revealed the defects.

No special objection being made in the brief to the instructions other than the fifth, as set forth, they will not be further considered than to say that they appear to be in the line of judicial safety, and fairly within that of approved public policy, which must control such semi-public improvements as that here involved, and that they meet our entire approbation.

In the case of *City of Lincoln v. Walker*, 18 Neb. 244, cited by counsel for the plaintiffs in error, it was held that, "in an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant." Applying this rule of law to the case at bar, I understand it to mean that the plaintiff being able to prove the injury and loss to her testator by reason of the negligence of defendants, without disclosing any contributory negligence on the part of her testator, she may leave the whole question of contributory negligence to the pleadings and proofs of the defendants, as they shall be advised, and need not enter upon the negative task of disproving any possible negligence on the part of the testator; and as there are neither pleadings nor proof as to his contributory negligence, that question is not presented to be further considered.

The judgment of the district court is affirmed.

LANDLORD AND TENANT—TENANT'S RESPONSIBILITY FOR INJURIES TO THIRD PERSONS.—A tenant in control of leased premises, so far as third persons are concerned, is the owner, and is consequently responsible for nuisances upon the premises injurious to adjacent owners, and for all injuries from defects therein caused by a want of necessary repairs: Note to *Lowell City v. Spaulding*, 50 Am. Dec. 782, 783. The tenant, and not the landlord, is liable for injuries to third persons caused by the dangerous condition of leased premises; provided the landlord leased the premises in a safe condition, without contracting to keep them in repair, and did not license the tenant to do acts amounting to a nuisance: *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778; compare *Libbey v. Telford*, 48 Ma. 316; 77 Am. Dec. 229. Tenant is responsible for an injury caused by a coal-hole carelessly allowed to remain open upon the sidewalk in front of the leased premises: *Jennings v. Van Schaick*, 108 N. Y. 530; 2 Am. St. Rep. 459.

BOLLONG v. SCHUYLER NATIONAL BANK.

[26 NEBRASKA, 281.]

JUDGMENT AS ESTOPPEL. — Where, in an action by a national bank to recover the principal and interest on a note, the defendant avails himself of the remedy against usury provided by the state law, and recovers judgment in his favor upon his answer and cross-petition without objection, and accepts the result, he is estopped from subsequently objecting to the jurisdiction and authority of the court to render the judgment, or from questioning its validity, to the extent of instituting another action under a United States statute for an additional recovery upon the same facts under which his former recovery was had.

J. A. Grimison, Phelps and Sabin, for the plaintiff in error.

E. T. Hodson, for the defendant in error.

REESE, C. J. This action was instituted in the district court of Colfax County for the recovery, under section 5198 of the Revised Statutes of the United States, of twice the amount of illegal interest alleged to have been paid defendant in error, it being organized as a national bank under and in pursuance of the laws of the United States.

The petition contained twelve counts or separate causes of action, each being based upon a payment of illegal interest alleged to have been made to the bank. The total amount for which judgment was demanded was \$707.10.

The answer of defendant contained, among other things, the allegation as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action contained in the petition, that, prior to the commencement of this action, defendant instituted two several actions against the plaintiff in the district court of Colfax County upon the notes which were the evidences of the indebtedness upon which the several payments of illegal interest were alleged to have been made, and that in said actions plaintiff presented as defenses the same facts which are set out in said counts of his petition in this case; and that upon issue being joined thereon, the district court, upon a hearing of the causes upon trial, found in his favor, and rendered judgment thereupon in accordance with said findings; and that the whole matter presented in the counts referred to in plaintiff's petition had been adjudicated in such actions.

A reply was filed, by which all the allegations of the answer were denied.

A trial was had to the court, upon which it found in favor

of the plaintiff upon the causes of action set out in the second and third counts, and rendered judgment against the bank for the sum of \$236. Plaintiff brings the cause into this court by proceedings in error, and assigns for error that the court erred in its finding against him on the fifth, sixth, seventh, eighth, tenth, eleventh, and twelfth causes of action; that the findings and decision are not sustained by sufficient evidence, and are contrary to law.

It appears, from the evidence introduced upon the trial, that at a time prior to the commencement of this suit, the date of which is not given, the defendant instituted its action against plaintiff for the sum of \$2,000, alleged to be due upon a promissory note signed by plaintiff, dated May 24, 1866, and due thirty days after date, and that plaintiff in his answer to the petition admitted the execution and delivery of the note, and alleged, as a defense thereto, that on the sixteenth day of June, 1885, he borrowed from defendant the sum of \$2,000 for ninety days, and paid to it as interest thereon the sum of \$62, and that at divers other times set out in the answer the note was renewed, and usurious interest paid, amounting in all to the sum of \$311.50, usurious interest collected by defendant.

The answer contained an admission "that there is due to the plaintiff upon said promissory note the sum of \$1,689.50, and no more." The prayer of the answer was, that said sum of \$311.50, illegal interest paid, might be deducted from the amount named in the note, and that the costs of the action be taxed to the plaintiff. Upon a trial in that case being had, judgment was rendered in favor of defendant, who was plaintiff in the action, for the sum of \$1,689.50, the amount confessed in the answer, and costs were taxed to it.

It further appears that another action had been instituted against plaintiff by defendant upon a note of \$1,200, in the same court, and that an answer was filed presenting at length the defense of usury, admitting that there was due defendant the sum of \$994.80, and no more, and praying that the sum of \$149.40, the alleged usurious interest, be deducted from the original amount received. The result of the trial in that case was a judgment in favor of defendant for the sum of \$994.80, the amount confessed in the answer, and the taxation of the costs to it.

It clearly appears that the usury mentioned in the answers in the two cases referred to is the same as that which is alleged

in plaintiff's petition in this case, and that in these actions the illegal interest received was applied as payment on the original indebtedness, under the provisions of the interest laws of this state.

The contention of plaintiff is, that the judgments in the suits, to the extent of allowing him credit for the illegal interest paid, were void, and are not a bar to this proceeding, notwithstanding they were rendered in his favor upon his answer in the nature of a cross-petition, and that he has received the benefit thereof.

The question has been ably presented by counsel on either side, both by oral arguments and briefs, and is, to our mind, not free from difficulty.

As it has been held by this court in *First National Bank v. Overman*, 22 Neb. 116, that state courts have jurisdiction to enforce the collection of the penalty prescribed by section 5198 of the Revised Statutes of the United States for taking illegal interest, it might be contended with quite a degree of reason that under the provisions of sections 100 and 101 of the Civil Code the penalty given by the law of Congress, where it arises out of the transaction which forms the basis of a plaintiff's suit, might be pleaded as a counterclaim, and allowed as such. And were this the correct view, it is clear that plaintiff could not recover in this case, for the reason that in the former suits he presented by his answer the same facts which are now set up in his petition, and that the district court, by his procurement, erred in not giving the full relief prescribed by the law of Congress, and that the judgment would not for that reason be void. But it may be that in *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, the supreme court of the United States have held otherwise, and that no proceeding could be maintained for the enforcement of the remedy given by section 5198 other than by a separate and independent action of debt. We think the case referred to scarcely reaches to that extent, as it does not clearly appear that the claim presented in that case, for twice the amount of interest paid, was based upon the same transaction or contract set forth in the petition. As we deem it unnecessary to decide that question in this case, our decision will be based upon other and different grounds.

It may be conceded, as contended by plaintiff, that the defense of usury under the interest laws of this state cannot be pleaded in an action instituted by a national bank as a legal defense, and that the state courts have no jurisdiction as against

such banks to enforce the penalties prescribed by state law, and that the decisions of the district court in the former cases were erroneous, or even voidable, and yet we cannot see that plaintiff can again recover. In other words, that plaintiff, having availed himself of a supposed remedy, and having received a judgment in his favor upon his answer and cross-petition without objection, and having accepted the result, is estopped from subsequently objecting to the authority of the court to render the judgment. The district court, by which the former judgments were rendered, was a court of general jurisdiction. While it may be true, as hereinbefore intimated, that by the rule in *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, it was error for such court to render judgment under the usury laws of this state, yet we are not aware of any rule which can be applied which would render the judgment absolutely void, no objection having been made at the time, and the case having been allowed to go to judgment. If it could be said that it was the duty of the district court to strike plaintiff's defenses from his answer in these cases, and order them to be made the subject of separate and independent actions, yet its failure to do so could not render its judgments void as one without jurisdiction of the parties or of the subject-matter. The most that can be said is, that it had not jurisdiction over the subject-matter in that form of action; but it did have jurisdiction in a proper proceeding. The procedure having been had without objection by either party, and at the instigation of plaintiff in this action, we think the judgment was not only not void, but that plaintiff would be estopped to question its validity to the extent of instituting another action for an additional recovery upon the same facts upon which his former recovery was had.

While the application of the principles here announced to cases exactly like the one at bar may not be frequent, yet we think they should be so applied. The legal propositions are elementary, and of the many cases cited by counsel for defendant, we need to refer but to *Herman on Estoppel and Res Judicata*, secs. 51 et seq., and cases there cited; *Edwards v. Stewart*, 15 Barb. 67; and *Blair v. Bartlett*, 75 N. Y. 150; 31 Am. Rep. 455.

The judgment of the district court is affirmed.

JUDGMENTS, CONCLUSIVENESS OF.—As to what matters parties are concluded by judgment, see *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 138, and note 142, 143. Compare *Haines v. Flinn*, 26 Neb. 380, *post* p. 793, and note.

HAINES v. FLINN.

[26 NEBRASKA, 380.]

JUDGMENT AS RES JUDICATA. — Where, in an action to foreclose a mortgage, a junior mortgagee is made defendant, and, answering, sets up certain judgment liens and his mortgage, and prays for a decree foreclosing such liens, in response to which judgment is rendered in favor of plaintiff for the amount of his mortgage, and in favor of such junior mortgagee for the amount of his judgment liens, without mentioning his junior mortgage, such judgment, until reversed, is a bar to a subsequent action brought by such junior mortgagee to foreclose his mortgage.

JUDGMENT AS ESTOPPEL. — When a judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit, or by evidence *aliunde* consistent therewith, that it was between the same parties, and that the particular controversy sought to be concluded was necessarily tried and determined.

JUDGMENT AS RES JUDICATA — COLLATERAL ATTACK. — When a court has jurisdiction, it may decide every question which arises in the case, and whether its decision is correct or not, its judgment, until reversed, is binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter.

L. C. Chapman, for the appellant.

A. M. Appelget, for the appellee.

MAXWELL, J. This action was brought to foreclose a mortgage on real estate, the petition being in the ordinary form. On the trial of the cause, the court found for the defendant, and dismissed the action.

The defendants McCrosky, Wright, and Leach answer the petition as follows: "Now come said defendants McCrosky, Wright, and Leach, and Charles Leach, trustee of defendants McCrosky, Wright, and Leach, and for their answer to the petition of said plaintiffs, say that they admit the execution of the notes and mortgage by defendant James Flinn to those plaintiffs, and allege that they do not know, nor have they any means of knowing, the amount due thereon from defendant Flinn to plaintiff, and therefore deny that there is due on said notes the sum of \$356.15 and interest, or any other sum or sums, and call for proof.

"Defendants, further answering, admit that said mortgage was filed in the clerk's office of Johnson County, Nebraska, at the time in said petition named. Defendants McCrosky, Wright, and Leach, further answering, allege that on or

about the third day of February, 1886, these defendants, as plaintiffs, filed their petition in the district court in and for Johnson County, and state of Nebraska, against James Flinn and Elizabeth Flinn, William B. Goldsmith, Haines Brothers & Co., and Louis Grosjean as defendants, and praying for the foreclosure of a certain mortgage, made, executed, and delivered by James Flinn and Elizabeth Flinn, his wife, two of the defendants herein, to McCrosky, Wright, and Leach, plaintiffs in said cause, and defendants herein, to secure the payment of the sum of \$150, which said mortgage bore date on the ninth day of January, 1885, and was filed for record in the clerk's office of Johnson County, and state of Nebraska, on the ninth day of January, 1885, and conveyed to these defendants the following-described premises, situated in Johnson County, and state of Nebraska, to wit, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine (9), town four (4) north, of range 11 east.

"Said petition, among other allegations, alleged: Said Haines Brothers & Co. are made defendants herein because said James Flinn executed to them a mortgage on said premises, dated March 7, 1885, and filed for record in said Johnson County on March 27, 1885, and recorded in mortgage record O, page 476; said mortgage was conditioned to pay the sum of \$286.15; and that said mortgage of said Haines Brothers & Co. was subsequent to the mortgage of the plaintiffs therein, and subject thereto.

"That afterwards, to wit, on or about the sixteenth day of February, 1886, Haines Brothers & Co., the plaintiffs in this action, appeared and answered the petition of the plaintiffs in said cause, McCrosky, Wright, and Leach, and admitted, to wit:—

"That James Flinn executed to them a mortgage on the premises described in plaintiffs' mortgage and petition, dated March 7, 1885, and that the same mortgage was filed for record in said Johnson County on March 27, A. D. 1885, and recorded in mortgage record O, at page 476.

"That said mortgage was conditioned to pay the sum of \$286.15; and further, the said defendants therein, Haines Brothers & Co., answering, alleged:—

"That their mortgage as set up in plaintiffs' petition, and as herein admitted to be true, is not and will not become due until March 9, A. D. 1886; further answering, 'deny each

and every other allegation in this plaintiff's petition contained not herein admitted to be true.' And the said defendants, answering, in conclusion, say: 'Therefore these defendants pray that the said mortgage of these defendants, Haines Brothers & Co., may be foreclosed.'

"That McCrosky, Wright, and Leach, James Flinn, Elizabeth Flinn, and William B. Goldsmith may be foreclosed of all right of redemption or other interest in said premises, and for such other and further relief as equity and good conscience may require.

"That afterwards, at the April, 1886, term of the district court in and for Johnson County, and state of Nebraska, to wit, on the thirteenth day of April, 1886, said cause coming on to be heard on the issues joined, the court found: 'Due plaintiff from defendant James Flinn, on note, \$215, and same is a second lien on the premises; and that there is due defendant Haines Brothers & Co., on judgments, \$317.16, which is a third lien on the premises; and that there is due Louis Grosjean twenty dollars, which is the fourth lien; and that the claim of defendant William B. Goldsmith is the first lien, and not yet due, and shall be subject to it. Decree of foreclosure and order of sale.'

"In accordance with such finding so made, said decree of foreclosure was entered, and on the eleventh day of May, 1886, order of sale was issued directed to the sheriff of said county, who, after advertising said sale, sold the premises described, on the twenty-eighth day of June, 1886, to McCrosky, Wright, and Leach, which said sale was by the Hon. J. H. Broady, judge of said district court, on the seventeenth day of August, 1886, at chambers, confirmed, and deed ordered to be made to Charles Leach, the other answering defendant herein, and one of the firm of McCrosky, Wright, and Leach, in trust for said firm of McCrosky, Wright, and Leach. And these answering defendants further allege that each and all of the matters and things in plaintiffs' petition averred were by the said court at the April, 1886, term thereof, in the cause then therein pending between McCrosky, Wright, and Leach as plaintiffs, and Haines Brothers & Co., and the other defendants herein, defendants, were matters in issue before the said court in said cause; and that the said things and matters in issue were by the said court fully considered and determined, and these answering defendants were by said court found to have a lien prior to the mortgage lien of these plaintiffs, and decree was

rendered upon said finding; that in pursuance of such decree, the said premises were sold to satisfy the decree in favor of these answering defendants, and subject to the mortgage lien of defendant Goldsmith; that no appeal has been taken or proceedings in error had in said original suit.

"As a second matter of defense, these defendants aver that the mortgage sued on and described in plaintiffs' petition was executed upon land occupied at the time of the execution by the said James Flinn and Elizabeth Flinn, his wife, as a homestead, and which said mortgage was signed by the said James Flinn only, and defendants allege that said mortgage is not a lien upon the premises therein described.

"Defendants, further answering, deny that the said James Flinn is indebted in the sum of \$——, or any other sum, to the said plaintiff.

"Defendants further deny each and every allegation in plaintiffs' petition contained, except such as are herein specifically admitted.

"Wherefore these defendants pray that the court may decree that the matters and things in plaintiff's petition averred were in said first-named cause fully determined and adjudicated, and that these defendants' title to the said premises be decreed to be paramount and superior to the mortgage of said plaintiffs."

Flinn, in his answer, alleges that the land in controversy was the homestead of himself and wife, and that the mortgage to the plaintiff was not signed by his wife. The reply consists of certain denials. The answer of Haines Brothers, in the nature of a cross-petition, in the former action, is set out in the record, from which it appears that in the former action they had filed a cross-bill, and asked to have their mortgage foreclosed. The decree, however, fails to show that any sum was allowed Haines Brothers on the foreclosure of said mortgage, but they were allowed certain judgment liens claimed by them. No appeal was taken, and they seem to have been satisfied with the decree. It is impossible for us to hold such decree to be void. The court may have found that the mortgage had been satisfied, or that it was void, or given without consideration. The mortgage was then due, and for aught that appears it should have been foreclosed, unless some of the defenses to the same were considered sufficient to defeat it. The evidence in that case is not before us, and the presumptions are that the decree was right. The matter involved in the plain-

tiffs' petition, therefore, having been set up in a former action by cross-petition, and a judgment rendered thereon, is *res adjudicata*.

In *Washington etc. Packet Co. v. Sickles*, 5 Wall. 592, the supreme court of the United States say: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In our view, the matter involved in this case was properly before the court in the former action, and its judgment thereon will be conclusive.

The rule is, that "where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The **only** way for them to investigate such a judgment is by a rehearing of that cause, either by writ of error or some other legal and direct mode. For, to the extent to which the judgment goes, their rights have been considered and decided, and they have submitted to that decision, either from the force of law after a final hearing by a court of last resort, or from a disinclination to pursue the matter further when other courses of procedure for rehearings were open before them, and might have been had if they had so elected. Upon this point the authorities are numerous and decisive": *Hollister v.*

Abbott, 81 N. H. 448; 64 Am. Dec. 842; Wells on Res Adjudicata and Stare Decisis, 5.

This we regard as a correct statement of the law. The former decree, therefore, is conclusive, and this action is thereby barred. An examination of the record shows that the sale was confirmed at chambers, in a county other than that in which the land is situated. Whether, under our statute, there is authority to confirm a sale in this manner is not raised by either pleadings or proof.

There is no error in the record, and the judgment is affirmed.

RES ADJUDICATA. — As to what constitutes *res adjudicata*, and upon whom binding, see note to *Gould v. Sternburg*, 15 Am. St. Rep. 142, 143; note to *Hawk v. Evans*, 14 Am. St. Rep. 250, 251; compare also note to *Gayer v. Parker*, 8 Am. St. Rep. 229, 230.

CONCLUSIVENESS OF JUDGMENTS UPON COLLATERAL ATTACK. — Judgments not absolutely void are conclusive as to the recitals therein until reversed upon appeal, or set aside in a direct proceeding for that purpose: Note to *Gould v. Sternburg*, 15 Am. St. Rep. 143.

RES ADJUDICATA — FORECLOSURE OF MORTGAGE. — A decree finding the sum due upon a mortgage, and ordering the mortgaged premises sold to satisfy the judgment, is conclusive of the fact that the debt was due and of the amount due; and the mortgagor cannot set up that the decree was contrary to an agreement to give further time at a lesser rate of interest, for these matters are *res adjudicata*: *Windett v. Life Ins. Co.*, 130 Ill. 621. Where a married woman executes a mortgage upon her separate estate to secure her husband, which is subsequently foreclosed against her as a party, she cannot in a collateral proceeding call in question the consideration of the mortgage: *Watson v. Camper*, 119 Ind. 60. Where a plaintiff foreclosed a chattel mortgage against the mortgagor and purchasers of the mortgaged property, recovering a personal judgment against the mortgagor, not against the purchasers, as he might have done, he cannot afterwards bring an action against the purchasers to recover personal judgments: *Kenyon v. Wilson*, 78 Iowa, 408. Where a foreclosure decree has been reversed after a sale thereunder, at which the mortgagees become the purchasers, and a grantee of the mortgagor, who purchased *pendente lite*, who is also a party defendant as the part owner of a junior mortgage, submits without objection to an accounting upon a second trial of the suit, in which all rents collected by the prior mortgagees up to the date of the second trial are applied to reduce the prior mortgage to the benefit of the holders of the second mortgage, such grantee is bound by the accounting, and cannot afterwards sue to recover the rents collected by the prior mortgagees, on the ground that he was entitled to them as owner of the mortgaged premises: *Wise v. Walker*, 81 Cal. 11.

But a decree of foreclosure does not conclude strangers to the controversy in which it was rendered; nor an interested party, who was not made a party to the suit: *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379, and particularly note. Where a widow is entitled to have one third of her deceased husband's realty set off to her, or to be allowed to redeem from a mortgage executed by him, the theory of the existence of a mortgage having been adopted, a judgment awarding the partition is not *res adjudicata* with respect to the right of the mortgagees to redeem: *Quick v. Brenner*, 120 Ind. 364.

LIBERMAN v. STATE.

[25 NEBRASKA, 464.]

CONSTITUTIONAL LAW — TRIAL WITHOUT JURY. — A city charter providing that prosecutions for violations of the city ordinances shall be tried by the police court without the intervention of a jury is not void as being in conflict with a constitutional provision that the right of trial by jury shall remain inviolate, when the provisions of such charter apply only to minor misdemeanors and have no reference to the violation of the criminal laws of the state, wherein express provision is made for trial by jury.

MUNICIPAL CORPORATIONS — SUNDAY LAWS — CONSTITUTIONALITY OF ORDINANCE. — A city ordinance prohibiting all persons from engaging in certain kinds of business on the day known as Sunday, and excepting from its operation persons engaged in certain other kinds of business of necessity on that day, is not void as discriminating against one class of persons and as extending to another class privileges and business advantages over competitors and others engaged in business within the city.

MUNICIPAL CORPORATIONS — CONSTRUCTION OF SUNDAY ORDINANCE. — Where a city ordinance prohibits all persons from engaging in certain kinds of business on the day known as Sunday, but excepts from its operation those who conscientiously observe the seventh day of the week as the Sabbath, the fact that a person believes the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception.

Pound and Burr, for the plaintiff in error.

G. M. Lambertson, for the defendant in error.

REESE, C. J. This was an application to the district court for a writ of *habeas corpus*, in which it was alleged that plaintiff in error was deprived of his liberty by P. H. Cooper, the marshal of the city of Lincoln. The writ was issued by order of the judge of the district court, to which the marshal made return that he held plaintiff in error by virtue of a writ of commitment issued by the police judge of the city of Lincoln, wherein it is shown that plaintiff in error had been convicted before said police judge of the offense of keeping open his "dry goods and notion store" for the sale of goods on Sunday, in the city of Lincoln, in violation of a city ordinance, and had failed and refused to pay the fine imposed by the said police judge.

Upon a hearing before the district court, plaintiff in error was refused a discharge, and was remanded to the custody of the marshal. He now prosecutes error to this court.

Two questions are presented for decision, which will be briefly noticed in the order in which they are presented by plaintiff in his brief.

1. It is stipulated, though not shown by the transcript of the police judge, that upon the trial of the case in the police court, plaintiff in error demanded a jury trial, which, under the provisions of section 106, chapter 11, of the Session Laws of 1887, entitled Cities of the First Class, was refused. It is now insisted that by the provisions of the constitution he was entitled to a jury trial, and that the law depriving him of that right is unconstitutional. The ordinance under the provisions of which the conviction was had provides as a penalty for its violation a fine of not less than five dollars nor more than one hundred dollars, without imprisonment except upon failure of payment of the fine imposed. The section above referred to provides that prosecutions for a violation of city ordinances shall be tried by the police court without the intervention of a jury, and by section 98 of the same act, an appeal to the district court is permitted in all cases where the fine imposed exceeds ten dollars. It may be observed that the provision requiring prosecutions for violations of ordinances to be tried by the police judge alone, without a jury, has no reference to violations of the criminal laws of the state; for in such cases it is expressly provided that jury trials may be had.

We do not think that the law under which the police judge acted can be said to be unconstitutional, or that by the provisions of the constitution, plaintiff in error had the right to demand a jury trial. Ordinances are made by virtue of the incidental powers of municipal corporations, under the authority conferred by legislative enactment, in the exercise of their legitimate police authority for the preservation of the peace, good order, safety, and health of the inhabitants of the corporation, and relate, generally, to minor acts not embraced in the public criminal laws of the state, and need not be tried by a jury, their speedy enforcement being usually necessary to accomplish the purpose of their enactment. They are not included within the provisions of the constitution: *City Council of Anderson v. O'Donnell*, 29 S. C. 355; 13 Am. St. Rep. 728; *Carter v. Camden District Court*, 49 N. J. L. 600; *Dillon on Municipal Corporations*, secs. 432, 433; *Cooley's Constitutional Limitations*, 596; *Sedgwick on Statutory and Constitutional Law*, 548, 549; *Proffatt on Jury Trial*, sec. 95, and cases cited in note.

2. It is next contended that the city ordinance for the violation of which plaintiff was convicted is unconstitutional and void, for the reason that it extends to certain classes of indi-

viduals privileges and business advantages over competitors and others engaged in business within the municipality. This contention is based upon the provisions of the ordinance by which certain kinds of business are exempted from its operation. The section of the ordinance under which plaintiff was convicted is as follows: —

“Sec. 2. It shall be unlawful for any business house, bank, store, saloon, or any office, to be open, or for any person or persons to be admitted thereto for general business on said day, within the limits of said city, excepting only offices of physicians, telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar-stores, eating-houses, ice-cream parlors, fruit-stands, or other like places of business in the sale of goods and commodities of a perishable character and for immediate use, street-cars, railway passenger trains, livery-stables, vendors of ice, bread, and milk, and drug-stores for necessary purposes. Meat markets shall be permitted to be opened till the hour of nine o'clock, A. M.; and bath-rooms, and the printing of newspapers and distribution thereof, shall be open until the hour of twelve o'clock, noon. The term ‘saloon,’ as used in this ordinance, shall be construed to include all places where malt, spirituous, or vinous liquors are sold or kept for sale as a beverage. And it is further provided that all persons engaged in and about these occupations shall conduct the same in a quiet, orderly manner, so as in no way or manner to interfere with or molest persons engaged in public worship at places of worship; provided, that works of necessity and charity are excepted from the operation of this article; and provided further, that nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, superintendents or keepers of toll-bridges or toll-gates from attending and superintending the same, or ferry-men from conveying travelers over the waters, or persons moving their families on such days, or to prevent railway companies from running necessary trains.”

The stipulation of facts upon which the case was submitted to the district court contains the following paragraph: —

“It is further agreed that the defendant is a member of the firm of Liberman and Berkson, and keeps what is called “The Fair,” on O Street, between Ninth and Tenth streets, in said city, and keep a general stock of ladies’ and gentlemen’s fur-

nishing goods, notions, fancy goods, dry goods, soaps, combs, toilet-boxes, canes, etc., etc.; that next adjoining said place of business on the west is W. J. Turner's drug-store, who keeps a general stock of drugs, paints, oils, etc., and is a competitor of this defendant in the line of said goods called notions, fancy goods, soaps, combs, toilet-boxes, cigar-holders, tobacco-boxes, etc.; that also within the said city are a great number of drug-stores and cigar-stands dealing in said articles called cigars, cigar-holders, tobacco, tobacco-boxes, canes, etc."

It is contended that by this ordinance plaintiff in error is compelled to close his place of business on Sunday, while the drug-stores, tobacco houses, and others in competition with him in trade, are not required to do so. We apprehend that the ordinance under consideration must be given a reasonable construction, and that while a druggist is allowed to keep his place of business open "for necessary purposes," he would not be allowed to engage in the sale of soaps, canes, combs, toilet-boxes, and cigar-holders without being held to have violated the provisions of the ordinance. While a drug-store may be kept open for necessary purposes, yet it is not provided that the proprietor may engage in indiscriminate trade on Sunday, but, evidently, that he may sell such medicines, and only such, as are necessary to relieve the actual necessities of the public on that day. There is no discrimination in the ordinance against plaintiff's business, and it is not void.

It is said in the stipulation that plaintiff in error and his partner "are Jews, and do conscientiously believe in the seventh day of the week as their religious day of rest; and upon said seventh day of the week, while said store was open, they stood ready to sell any article in their store, as well as upon the first day of the week, and on said seventh day of the week they keep their store open the same as upon other days."

The ordinance provides that its provisions "shall not extend to those who conscientiously observe the seventh day of the week as the Sabbath"; and therefore, as plaintiff does not "observe" that day as a Sabbath, he is not within its provisions.

The judgment of the district court is affirmed.

MUNICIPAL CORPORATIONS — ENFORCEMENT OF ORDINANCES — TRIAL WITHOUT A JURY. — The enforcement of municipal by-laws, by the infliction of fines thereunder without the intervention of a jury, is not in conflict with the provisions of the state constitution securing trial by jury, because such right was not claimed for nor accorded to offenders in such cases before the adoption of the state constitution: *Floyd v. Commissioners*, 14 Ga. 354; 58 Am. Dec. 559; but see *Rost v. Mayor*, 15 La. 129; 35 Am. Dec. 186. .

SUNDAY LAWS — OBSERVANCE OF. — Jews, Seventh-day Adventists, and any others who conscientiously observe the seventh day of the week to worship God are as much bound to refrain from business or worldly employment on Sunday, under laws prohibiting the same, as any other persons: *Specht v. Commonwealth*, 8 Pa. St. 312; 49 Am. Dec. 518; *Society for Visitation etc. v. Commonwealth*, 52 Pa. St. 125; 91 Am. Dec. 139; note to *City Council v. Benjamin*, 49 Am. Dec. 623; note to *Johns v. State*, 41 Am. Rep. 579, 580; *City of Shreveport v. Levy*, 26 La. Ann. 671; 21 Am. Rep. 553.

SUNDAY LAWS — CONSTITUTIONALITY OF. — The question of the constitutionality of Sunday laws, generally, is thoroughly discussed in the note to *City Council v. Benjamin*, 49 Am. Dec. 616-623. The Sunday law of Louisiana of 1886 does not violate the provisions of the state constitution concerning religious liberty, etc., nor of constitution of the United States respecting protection "of life, liberty, and property," and the guaranty of "equal protection of the laws." The law is a valid exercise of the police power of the state: *State v. Judge*, 39 La. Ann. 132; and exemptions from the operation of the law must not include cases not within the contemplation of its makers. Those claiming the exemption to apply to them must prove it with certainty: *State v. Fernandez*, 39 La. Ann. 539.

TOWER v. FETZ.

[26 NEBRASKA, 706.]

DEED, WHEN A MORTGAGE. — If a mortgagor, being threatened with foreclosure, conveys the mortgaged premises to the mortgagee, in consequence of an agreement that the latter would sell the land, or permit the former to do so, and after paying the mortgage debt, interest, and expenses, pay the surplus to the mortgagor, such conveyance is a mortgage.

MORTGAGE, DEED ABSOLUTE MAY BE SHOWN TO BE. — A deed absolute in its terms may be shown by parol evidence to have been given only as security for the payment of money, and to have been intended, as between the parties, to operate only as a mortgage.

Savage, Morris, and Davis, for the plaintiff in error.

Montgomery and Jeffrey, for the defendant in error.

COBB, J. This action was commenced in the district court of Douglas County by David Fetz, plaintiff, against Lyman H. Tower, defendant.

The petition alleges that in March, 1880, the plaintiff was a resident of Webster County, and was owner in fee of one quarter-section of land therein described, and that the defendant was a resident of the city of Hastings, engaged in negotiating loans on farm property; that at said time plaintiff employed defendant to negotiate a loan on said land for the sum of eight hundred dollars, with one Edwin R. Fay, for which plaintiff executed a mortgage on said land securing a

note payable to said Fay, — years after date, with interest at ten per cent, semi-annually; that plaintiff was unable to meet the interest coming due on said note, and on the 28th of June, 1882, he was visited by one Dent, who was agent of said defendant, and who, by authority of defendant, approached plaintiff and informed him that if he did not pay the interest on said mortgage to Fay, the mortgage would be foreclosed, and the property sold for a sum less than the amount of his indebtedness, and that a deficiency judgment would be rendered against him; but that if he would convey the land to the defendant, Tower, he, Tower, would negotiate and sell the same at private sale for a much better price than it would bring at a judicial sale, and out of the proceeds would pay the said mortgage to Fay, and the taxes on the property, and account to the plaintiff for the balance of the price he should receive for the land. Accordingly, having confidence in the representations and promises of Dent, plaintiff made and delivered to Tower his warranty deed for the land, conveying the same to him, which deed was accepted by Tower on the day last mentioned, for which the plaintiff received no other consideration than the promises hereinbefore stated; that on January 2, 1883, Tower paid the taxes for the year 1881 on the land, amounting to \$18.70, and on July 10, 1883, paid the taxes for 1882, amounting to \$12.48; that defendant never paid any other sum on said land, but on June 27, 1883, sold the same for \$1,200 over and above the mortgage, subject to the payment thereof, to one Wallace L. Lighthart, and executed a deed therefor, and received the said sum of \$1,200; that the defendant, though often requested by the plaintiff to account for and pay to him the consideration received from said Lighthart for said land, less the amount of taxes paid thereon, has neglected and refused, and still neglects and refuses, so to do; with prayer for judgment for \$1,168.82, with interest from June 27, 1883, at seven per cent per annum.

The defendant answers, denying each and every allegation except such as are specifically admitted or denied; and admits that the plaintiff was the owner of the land; that he negotiated a loan for the plaintiff with Fay, as alleged; that not knowing whether or not one Dent made the representations set forth, denies the same, and denies that Dent was the agent authorized and empowered to make any such representations, and says that he purchased the land from plaintiff, paying therefor a valuable consideration, and, in addition

thereto, assumed the mortgage and note mentioned; that the land at the time of the purchase was not worth more than the amount loaned thereon, eight hundred dollars, and in assuming the same, defendant was paying the full value, and that the sale was made to him without any conditions whatever, and was a *bona fide* sale, and so understood by all parties concerned. He admits that he afterwards paid the taxes, and that on June 27, 1883, he sold the land to Wallace L. Light-hart, and conveyed the same, for \$1,200; and that he refuses to account to plaintiff for said sum, less the taxes, or for any other sum, and denies that he is indebted to the plaintiff in \$1,168.82, or any other sum whatever.

The plaintiff replied, denying that the defendant purchased said land, paying a valuable consideration, and denying that he paid any consideration whatever; denying that the land, at the time of the purchase, was not worth more than the amount loaned thereon, eight hundred dollars; alleging that the land was worth at that time two thousand five hundred dollars; and denying that in assuming said note and mortgage defendant was paying its full value; and denying that the sale was made without conditions, and was a *bona fide* sale, and so understood by all parties.

There was a trial to the court, a jury being waived, with a finding for the plaintiff, and judgment for \$1,567.50.

The defendant brings the cause to this court on error, and assigns twenty distinct errors in the proceedings below, seventeen of which are for the alleged erroneous admissions of testimony offered by the plaintiff and objected to by defendant; the eighteenth, that the decision is not sustained by sufficient evidence; the nineteenth, that the decision is contrary to law; the twentieth, that the court erred in overruling the motion for a new trial.

The last three only will be considered, as it has been often held that where a cause is tried to a court without the intervention of a jury, its judgment will not be reversed by an appellate court for error in the admission of testimony on the trial: *Richardson v. Doty*, 25 Neb. 420; *Enyeart v. Davis*, 17 Neb. 228; 1 Greenl. Ev., 14th ed., sec. 49. So that if upon the examination of the last three points it shall appear that sufficient material and competent evidence was before the court to sustain its findings and judgment, they will not be reversed for the reason that there was also before it illegal and incompetent testimony.

It appears from the bill of exceptions that in 1880 the plaintiff was the owner of a farm in Webster County, and the defendant was carrying on a loan agency and a business at Hastings. The plaintiff applied to the defendant for a loan of money on his said farm. Defendant entertained the application, and sent one Dent, his brother-in-law, and general agent on the outside business of his loan branch and agency, to inspect and value the farm. This being done, resulted in the negotiation of a loan of eight hundred dollars by the plaintiff, through the agency of the defendant, from one Edwin R. Fay, of New York, an old customer of the defendant, a mortgage being executed upon the farm to secure the loan to Fay for said eight hundred dollars, drawing ten per cent interest, payable semi-annually, for five years from March, 1880, the period the mortgage was to run; and that the plaintiff, through his son, paid one year's interest on the loan. At the expiration of the second year, that year's interest was unpaid, and defendant notified plaintiff by letter, as he testifies, to the effect that unless the interest was paid, the mortgage would be foreclosed; that some time afterwards, defendant being absent in the East, wrote to Mr. Dent, his general agent, that he would assume the mortgage of plaintiff to Fay, "in consideration of the warranty deed to me." About this time, and presumably after the receipt of the letter from Dent by the defendant, as appears by the testimony of the plaintiff, Dent applied to the plaintiff, representing that he was sent by the defendant to demand the interest due on the mortgage. The plaintiff being unable to pay the interest, Dent informed him that "they would have to foreclose the mortgage if he did not make some arrangement"; that plaintiff replied to him that "he did not know what arrangement he could make, as he had no means at hand, at all, except the farm"; that Dent then said that "they had a good deal of land on their hands, and were not very particular about taking any more; but if plaintiff would agree to make them over a deed, they would take the land and sell it, and whatever was over after paying the mortgage and the actual expenses, they would pay to him, and that plaintiff might also have the same privilege, provided he would make the deed" to sell the land, and to notify them that he had sold it, and turn the money over to them; that all that was done; and that was the understanding; that Dent said if the plaintiff did not do that, the mortgage would be foreclosed, and plaintiff would be burdened with another debt "on his

relations, and that he had better do it"; that Dent agreed at the time to give plaintiff papers to show this arrangement; that the deed was then written out by Dent; was left at the county clerk's office, and was afterwards executed by plaintiff and his wife, and was placed on record. This deed was a general warranty deed of the mortgaged farm of plaintiff to defendant, expressing the consideration of \$925, executed on June 28, 1882. There does not appear to have been any defeasance executed to the plaintiff by the defendant, nor any one for him, in accordance with the understanding between Dent and the plaintiff, as testified to by the latter.

The above facts, excepting those pertaining to the loan, the execution of the mortgage, the paying of one year's interest by the plaintiff's son, the delinquency of the second year's interest, the notifying of the plaintiff by the defendant that unless the same was paid the mortgage would be foreclosed, the writing by defendant to Dent from the East that he would assume the mortgage in consideration of a warranty deed of the farm, and the conveyance of the farm by plaintiff and wife to defendant, are denied in general by the defendant; but there is no evidence in respect thereto in conflict with that of the plaintiff. Just one year and a day after the execution of the deed by the plaintiff and wife to the defendant, the defendant and wife made their deed of the farm to William L. Lighthart for the expressed consideration of twelve hundred dollars, subject to the said mortgage and taxes.

It will be observed that the original mortgage was directly to Mr. Fay. The defendant testifies that although he did not guarantee mortgages taken by him directly to Fay, and while he did not think that he would be obliged to make good any deficiency in such loans, yet, in point of fact, he had always made good the loans, and had always felt that, without reference to any special guaranty, he should take care to make good any such loans; therefore, the defendant stood in the same attitude toward the plaintiff, in this transaction, as if the original mortgage had been made to him, and he was the owner of it; and this being the case, according to the testimony of the plaintiff, which was accepted by the court, the absolute deed of the plaintiff was substituted for the mortgage, not for the purpose of conveying the equity of redemption, but of placing it in the power of the defendant to sell and convey the land, and thereby raise the money to discharge the mortgage and taxes. According to the defendant's testimony, Dent was authorized

to receive a conveyance of the land from the plaintiff; but notwithstanding that, he further testifies that Dent was not authorized to make the contract and offer the promises which the plaintiff testifies he made and offered to him.

I think that the deed, under the circumstances in evidence, must be held to be of that character, and to have been given for the purpose, expressed by whatever contract was made and such understanding as was had between the plaintiff and Dent at the time of its execution by the one and its acceptance by the other.

It is worthy of mention that neither the note, nor the mortgage executed by the plaintiff to Fay, was either canceled or delivered up to the plaintiff at the execution of the deed; nor does it appear to have been done to this day.

I do not conceive the question of estoppel to be a controlling consideration in this case, but rather that by means of this conveyance, the defendant, having the control of the mortgage, and acting through Dent, who was clearly his agent to receive the deed, and by the subsequent disposal of the land, received a large sum of money in excess of that sufficient to pay all claims, which, as agent for and moral guarantor to Fay, or Fay himself, he was entitled to receive in his discharge of the mortgage. This money it would appear to be inequitable and against good conscience to decree that the defendant should retain.

But the most important legal question presented is, whether the trust created by and resulting from the deed, absolute on its face, could be proved by parol testimony. There is sufficient authority on this question. The case of *Babcock v. Wyman*, 19 How. 289, was in all material features similar to the case at bar. One Nehemiah Wyman was seised in fee of real property in Charlestown, Massachusetts, and mortgaged it to the plaintiff to secure certain debts due him in his own right, and certain others due to the estate of Francis Wyman, deceased, of which the plaintiff was executor. Nehemiah, not being able to pay the accruing interest to the plaintiff, and being urged by his brother William to make a deed in fee of the land to the plaintiff that he might manage and improve it, and apply the rents and profits to the interest, and gradually liquidate the principal, and being promised by the plaintiff further advances, conveyed the property to the plaintiff, it being expressly agreed that notwithstanding the form of the conveyance, it should stand as security only for

the sums due from him, amounting to \$2,033.87. The plaintiff took possession of the property, and afterwards represented himself as the sole owner, and sold it at private sale, without notice to Nehemiah, for eight thousand dollars. Nehemiah subsequently conveyed his right to redeem to Edward Wyman, a citizen of the state of Missouri, who exhibited a bill against the plaintiff in error in the circuit court of the United States for the district of Massachusetts. Decree was rendered, on evidence and argument, for the complainant, and the cause was brought to the supreme court of the United States for review. The principal question raised by the appellant was whether, under the circumstances of the case, it was competent to show by parol evidence that a deed absolute in terms was intended to operate only as a mortgage. The opinion was by Justice McLain, who, upon principle and the authority of that court, and other notable instances, held that it was competent to prove the trust thus established by parol testimony. The decree of the circuit court was affirmed.

Supplemental to this is the case of *Morgan's Assignees v. Shinn*, 15 Wall. 105, in which the same question arose. The assignees of the plaintiff, in this case, to enforce a contribution for an advance made for the repairs and expenses of the *Fairfax*, a steamer, exhibited a bill averring that the defendant was the owner of one fourth part of the vessel, and the defendant answered that he had a mere interest as a mortgagee. It appeared in the facts of the case that in October, 1865, one Kelly was the owner of one fourth part of the vessel, and made a bill of sale of his interest to the defendant, and at his instance the bill of sale was forthwith recorded. On the 23d of October the vessel was re-enrolled, by Morgan swearing that the defendant was the owner of one fourth. Subsequently, the vessel was destroyed by fire. In the trial court there was the parol evidence of the defendant and that of the writer of the bill of sale, and others, that the bill of sale, though absolute in its terms, was intended only to secure the payment of money advanced by the defendant to Kelly to enable him to pay for his one-fourth part of the vessel. The case presented was, that if the defendant was the real owner, under the terms of the bill of sale, he was liable to the plaintiffs for the one-fourth part of the advances for repairs and expenses of the vessel; but if the bill of sale was only a security, then he was not liable. The trial court dismissed the bill, and the plaintiffs brought it for review to the supreme

court. The opinion of the supreme court, by Justice Strong, held that it is not questionable that an instrument absolute in its terms may be shown, by parol evidence, to be only a mortgage; the author of this opinion citing the case, already referred to, of *Babcock v. Wyman*, 19 How. 289; *Foyer v. Lavington*, 1 P. Wms. 268; *Russell v. Southard*, 12 How. 139. The judgment of the lower court was unanimously affirmed.

On these considerations and precedents, the judgment of the district court is affirmed.

DEED ABSOLUTE ON ITS FACE MAY BE CONSTRUED AS A MORTGAGE. — Parol evidence is admissible to show that a deed absolute upon its face was in fact a mortgage, and so intended by the parties thereto: *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696, and note; note to *Thompson v. Patton*, 15 Am. Dec. 47, 48; *Ensminger v. Ensminger*, 75 Iowa, 89; 9 Am. St. Rep. 462, and note; *Franklin v. Ayer*, 22 Fla. 654; *McMillan v. Bissel*, 63 Mich. 66; but see *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802. A deed absolute upon its face, but intended to be only a mortgage, cannot operate as such unless it is shown that the redemption clause was omitted through ignorance, mistake, fraud, or undue advantage: *Green v. Sherrod*, 105 N. C. 197. An absolute deed will not be construed to take effect as a mortgage merely because of an agreement to reconvey: *Stahl v. Dehn*, 72 Mich. 645. A deed absolute upon its face is a mortgage, when so intended by the parties: *Jamerson v. Emerson*, 82 Me. 359; *Raynor v. Drew*, 72 Cal. 307; *Helm v. Boyd*, 124 Ill. 370; *McMillan v. Jewett*, 85 Ala. 476; *Robinson v. Bank*, 85 Tenn. 363; *Parmer v. Parmer*, 88 Ala. 545.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

TERRY v. MUNGER.

[121 NEW YORK, 161.]

ELECTION TO WAIVE TORT AND SUE IN ASSUMPSIT. — When wrong-doers have converted but have not sold the property of another, he may waive the tort, and proceed upon an implied contract of sale to the wrong-doers. The contract implied in such cases is, that they will pay the value of the property as if it had been sold to them by the owner.

THE TITLE OF PROPERTY CONVERTED PASSES TO THE WRONG-DOER when the owner elects to waive the tort, and to sue in *assumpsit* for the value of the property.

ELECTION TO WAIVE TORT AND SUE IN ASSUMPSIT PERSONS WHO HAVE BEEN GUILTY, WITH OTHERS, OF CONVERTING PROPERTY vests the title to such property in the persons so sued, and the plaintiff cannot, if he had knowledge of the facts when he commenced his action, subsequently maintain an action against another person to recover damages against him for the alleged conversion of the same property.

JUDGMENT RECORD IS ADMISSIBLE EVIDENCE in favor of one who was not a party to the former action, if the purpose in offering it in evidence is to show that the plaintiff, who is suing for the conversion of his property, has elected to waive such conversion, and to sue in *assumpsit* for its value, because by such election the plaintiff parted with his title to his property.

ELECTION BETWEEN INCONSISTENT RIGHTS AND REMEDIES CANNOT BE RECONSIDERED, even where no injury has been done by the choice, or would result from setting it aside. Hence an election to waive a tort and to sue in *assumpsit* takes effect on the commencement of the action, whether it proceeds to judgment or not.

ELECTION TO WAIVE TORT AND TO SUE IN ASSUMPSIT ONE OF SEVERAL PERSONS who were guilty of converting property operates in favor of his co-tort-feasors who are not parties to the action, and precludes any subsequent recovery against them for such conversion, because by such suit the plaintiff elects to consider the tort as a sale of the property, and the title is vested in the tort-feasor; and having thus divested himself of title, the plaintiff has no cause of action, unless it be one founded upon an implied sale.

ACTION for the conversion of property. The judgment of the trial court as well as that of the general term was in favor of the defendant.

J. M. Dunning, for the appellants.

George Bowen, for respondent.

PECKHAM, J. The plaintiffs commenced an action heretofore against two other persons named, respectively, Kipp and Munger, on account of the same transaction for which this action was brought against the above-named sole defendant. The character of the complaint in that action was before this court, and the case is reported in 88 New York, 629. The defendants in that case were charged with detaching and carrying away from the mill the machinery in question in that case, and also in this, and using it for themselves. It was there held, upon a perusal of the complaint, that the action was of a nature *ex contractu*, and not *ex delicto* for the wrong done plaintiffs by the conversion of their property. As the defendants therein had not, after their conversion of it, themselves sold or otherwise disposed of the property which they acquired from the plaintiffs, the fiction of the receipt by defendants of money for the sale of the property, which *ex æquo et bono* they ought to pay back to plaintiffs, and which they, therefore, impliedly promised to pay back, could not be indulged in, and the position of the parties would have been, at one time, the subject of some doubt whether there was any foundation for the doctrine of an implied promise in such case, or any possibility of the waiver of the tort committed by the defendants in the conversion of the property.

In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrong-doer, and therefore, no money having been received by him in fact, an implied promise to pay over money had and received by defendant, to the plaintiffs' use, did not and could not arise. Such was the case of *Jones v. Hoar*, 5 Pick. 285. But the great weight of authority in this country is in favor of the right to waive the tort even in such case. If the wrong-doer has not sold the property, but still retains it, the plaintiff has the right to waive the tort, and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The

contract implied is one to pay the value of the property, as if it had been sold to the wrong-doer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer when the plaintiff elects to so treat it: *Pomeroy on Remedies and Remedial Rights*, 2d ed., secs. 567-569; *Putnam v. Wise*, 1 Hill, 234, 240; 37 Am. Dec. 309; *Berly v. Taylor*, 5 Hill, 577, 584; *Norden v. Jones*, 33 Wis. 600, 605; 14 Am. Rep. 782; *Cummings v. Vorce*, 3 Hill, 283; *Spoor v. Newell*, 3 Hill, 307; *Abbott v. Blossom*, 66 Barb. 353. We think this rule should be regarded as settled in this state. The reasons for the contrary holding are as well stated as they can be, in the case, above cited, from Massachusetts (*Jones v. Hoar*, 5 Pick. 285); and some of the cases looking in that direction in this state are cited in the opinion of Talcott, J., in the case of *Abbott v. Blossom*, 66 Barb. 353. We think the better rule is to permit the plaintiff to elect, and to recover for goods sold, even though the tort-feasor has not himself disposed of the goods.

There is no doubt that the complaint in the former case, reported in 88 New York, proceeded upon the theory of a sale of the property to the defendants in that action; and it was so construed by this court, and we have no inclination to review the correctness of that decision. We have, then, the fact that the defendants in that action were sued by the plaintiffs herein upon an implied contract to pay the value of the property taken by them, as upon a sale thereof by plaintiffs to them. The plaintiffs having treated the title to the property as having passed to the defendants in that suit by such sale, can the plaintiffs now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property, which conversion is founded upon his participation in the same acts which plaintiffs in the old suit have already treated as constituting a sale of the property? We think not. The judgment roll in the former action was received in evidence upon the trial of this case, against the objection of the plaintiffs, and notwithstanding the fact that the defendant herein was not a party to such action. It appears that all the facts surrounding the transaction as to the taking of the property were known to the plaintiffs at the time when they commenced their action on the implied contract of sale.

The plaintiffs objected to the introduction of the judgment

roll as incompetent and immaterial, and that there was no such defense set up in the answer.

The plaintiffs claim that the admission of such judgment violated the well-known general rule that a judgment is not binding upon any but parties and privies. We think the decision does not trench upon the rule in question. If the judgment had been introduced for the purpose of proving any fact adjudicated thereby, any fact in litigation therein, or which properly might have been so litigated, the rule would doubtless apply, and no such fact would or could be proved in favor of the defendant herein as against the plaintiffs by such judgment, because the defendant was not a party or privy to it. It was not by way of estoppel, however, that the judgment was admissible. It was admissible for the sole purpose of showing that the plaintiffs had elected to treat the taking of this property as a sale, and this was shown by a perusal of the complaint therein.

Any decisive act of the plaintiffs, with knowledge of all the facts, would determine their election in such a case as this: *Sanger v. Wood*, 3 Johns. Ch. 416, 421.

The proof that an action of that nature had been in fact commenced would have been just as conclusive upon the plaintiffs upon the question of election (proof of knowledge of all the facts at that time being given) as would the judgment have been. It was not necessary that a judgment should follow upon the action thus commenced. In those cases where the commencement of an action has not been regarded as an election of remedies, the fact has appeared that the plaintiff, at the time of its commencement, was not aware of the facts which would have enabled him to elect, or at least it did not appear that he was acquainted with the facts when he commenced his action. Such is the case in *Equitable C. F. Co. v. Hersee*, 103 N. Y. 25. Here the plaintiffs knew all the facts when they sued the other defendants.

The case of *Conrow v. Little*, 115 N. Y. 387, 393, is to the effect that the commencement of the action, where all the facts are known, is conclusive evidence of an election. Judge Danforth, in that case, in speaking of plaintiff's election to affirm or avoid the contract therein spoken of, said the plaintiffs could affirm or rescind it. "They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract." It was also held that the

discontinuance of that action was immaterial. It was the fact that the plaintiffs once elected their remedy, and acted affirmatively upon such election, that determined the issue. After that the option no longer existed, and it was of no consequence, therefore, whether the plaintiffs did or did not make their choice effective. When it becomes necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered, even where no injury has been done by the choice, or would result from setting it aside: 2 Herman on Estoppel and Res Judicata, p. 1172, sec. 1045.

The plaintiffs having by their former action, in effect, sold this very property, it must follow that at the time of the commencement of this one they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiffs recovering satisfaction in such action for the purchase price. It was their election to treat the transaction as a sale which accomplished that result, and that election was proved by the complaint already referred to.

But it is urged that this election of the plaintiffs is not binding upon them in favor of the defendant herein, because it was only against the defendants in the other action that they made their election. It is said there is no case to be found where an election has been treated as binding in favor of a stranger to the transaction, and that the defendant herein is such stranger, so far as the plaintiffs' transaction with the defendants in the other action is concerned.

I do not think this claim can be maintained. In the first place, What is the nature of the plaintiffs' act in electing to consider the transaction as a sale? It is a decision or determination upon their part to, in effect, ratify and proclaim the lawfulness of the act of taking the property, and it is an assertion on the plaintiffs' part that in so doing, the plaintiffs' interest in the property was purchased, and that thereby their whole title was transferred, and they ceased to own any part of the property, and that those who took it impliedly promised the plaintiffs to pay them the value of their interest in such property. This being so, why does not such transfer of title bind the plaintiffs as to the whole world? Surely, the title which plaintiffs once had in the property cannot at the same time rest with them and pass to those who took it. If the title really once passed, that would be a fact actually existing, which anybody ought to have the right to prove if it became

material in protecting his own rights, unless there were some equitable considerations in such case which should prevent it. I cannot see that any exist here. With full knowledge of all the facts, the plaintiffs deliberately elected to treat the transaction, in which this defendant's share was well known, as a sale of the property, and now they propose to recover from this defendant damages for the conversion by him of the very same property which they have already said they sold by virtue of the very transaction which they now claim amounted to a conversion of the property by this defendant. Why should the defendant not be permitted to set up such sale as a complete defense to this action? The plaintiffs have done nothing by reason of defendant's acts which should estop him from setting up this defense. Their situation has not since been altered for the worse by anything the defendant has done. If not, then the fact that the plaintiffs sold the property by virtue of the transaction which they now seek to treat as a conversion of it by this defendant must and ought to operate as a perfect bar to the maintenance of this action. And this is not in the least upon the principle of equitable estoppel. It is upon the principle that the plaintiffs, by their own free choice, decided to sell the property, and having done so, it necessarily follows that they have no cause of action against defendant for an alleged conversion of the same property by the same acts which they had already treated as amounting to a sale.

In *Conrow v. Little*, 115 N. Y. 387, already cited, the plaintiffs' election to affirm the contract between them and Branscom, evidenced by their commencement of the attachment suit, was held conclusive upon them, and the defendants were permitted to take advantage of such election, although they were not parties or privies to the plaintiffs' suit against Branscom. The defendants were enabled to take advantage of it, because such election showed that the plaintiffs had affirmed their contract with Branscom, and the plaintiffs' suit against defendants Little could only be maintained upon the assumption that such contract had been rescinded. If the other suit had gone to judgment, would not such judgment have been admissible for the purpose of showing the naked fact of the election of plaintiffs to affirm the contract? I have no doubt of it.

In *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, we held that the action could not be maintained, because the plaintiff, by suing the party to whom the bank

had already wrongfully paid the money, elected to regard such payment as rightfully made, and a cause of action against the bank to recover against it the amount of its former indebtedness to the plaintiff was held to have been forever abandoned because of such election. In that case, in order to prove the fact of election, the defendant proved the commencement of the former action by the plaintiff, and it was proved, as we assume, by the production of the judgment roll in such former action. It was admissible for the same purpose for which the judgment was admissible in this case; viz., to prove the fact of the plaintiff's election to pursue a totally inconsistent remedy. The defendant was not precluded from availing itself of such defense, although it was neither a party or privy to the judgment which proved the fact of such election.

In *Bank of Beloit v. Beale*, 34 N. Y. 473, the plaintiff put in evidence a judgment roll in which it was neither a party or privy to show that Sweet had made an election therein, which bound him, and consequently the defendant Beale. This court held the judgment conclusively proved the election.

These views are fatal to the maintenance of this present action for a conversion against the defendant.

If the plaintiffs herein had commenced their action against this defendant, based upon an implied promise by him to pay the value of the property, as upon a sale thereof to him in connection with the defendants in the other suit, a totally different question would have arisen, upon which we express no opinion. The plaintiffs, in such action, might urge that it ought to be sustained, upon the ground that the defendant herein was one of the wrong-doers in the transaction resulting in the taking of this property, and that the tort therein committed by him and the defendants in the other suit was a joint and several one, for which they were jointly and severally liable, and when the tort was waived by the plaintiffs, and an implied contract was based upon such waiver, the contract implied was of the same nature as the tort which was waived, and was a joint and several contract. Being a joint and several contract, an action against the other defendants upon their several contract, and a recovery of judgment without satisfaction, would constitute no defense to an action against this defendant, based upon his several and implied contract to pay the value of the property. There may be

some authority for this course of reasoning: *C. N. Bank v. N. P. Bank*, 32 Hun, 105. We neither affirm nor deny its soundness, and only refer to it in order to repel any possible implication that in this decision we have held that no such action could be maintained. But even if such an action would lie, we cannot turn the present one for a conversion of the property into one to recover the value thereof as upon a sale to defendant: *People v. Dennison*, 84 N. Y. 272; *Romeyn v. Sickles*, 108 N. Y. 650.

As to the other ground of objection taken by the plaintiffs, we think the evidence was admissible, for the reasons stated by the learned judge at general term.

Upon the whole case, we are satisfied that no error was committed prejudicial to the plaintiffs, and the judgment should be affirmed, with costs.

WAIVER OF TORT TO SUE IN ASSUMPSIT.—As to the right of a party to waive a tort and sue in *assumpsit*, generally, see note to *Webster v. Drinkwater*, 17 Am. Dec. 242-247. The owner of personalty wrongfully converted into money or its equivalent may waive the tort and sue in *assumpsit*; but otherwise *assumpsit* cannot be maintained: *Kidney v. Persons*, 41 Vt. 386; 98 Am. Dec. 595; *Gilmore v. Wilbur*, 12 Pick. 120; 22 Am. Dec. 410; *O'Conley v. Natchez*, 1 Smedes & M. 31; 40 Am. Dec. 87. To enable the owner of personalty to waive the tort and sue in *assumpsit*, where it has been wrongfully taken from him, it must have been converted into money: *Stearns v. Dillingham*, 22 Vt. 624; 54 Am. Dec. 88; but see *Stockett v. Watkins*, 2 Gill & J. 326; 20 Am. Dec. 438.

PURSUIT OF ONE REMEDY, WHEN AN IRREVOCABLE ELECTION not to pursue another: Note to *Fowler v. Savings Bank*, 10 Am. St. Rep. 487-494.

MOORE v. FRANCIS.

[121 NEW YORK, 199.]

LIBEL — QUESTION FOR THE COURT. — In an action for libel, if the publication is conceded, and the words are unambiguous, and admit of but one sense, the question of libel or no libel is one of law, which the court must decide, and which it must not leave to the jury.

LIBEL. — WORDS MAY BE LIBELOUS, THOUGH THEY DO NOT DEFAME A MAN IN THE ORDINARY SENSE, or impute blame, moral turpitude, or even censure, as when they affect one in his business by imputing incapacity or unfitness for its proper management.

LIBEL. — A STATEMENT THAT A PERSON IS INSANE, or that his mind is so seriously impaired as to disqualify him from attending to his business, is libelous.

LIBEL. — PUBLICATION CONCERNING A TELLER IN A BANK, TO THE EFFECT THAT HIS MENTAL CONDITION IS NOT GOOD, and that there had been

trouble in the bank caused by his mental derangement, is libelous, though it attributes his alleged condition to overwork.

LIBEL. — IT IS NO LEGAL EXCUSE THAT DEFAMATORY MATTER WAS PUBLISHED INADVERTENTLY, or with good motives, and in the honest belief of its truth.

Matthew Hale, for the appellant.

R. A. Parmenter, for the respondents.

ANDREWS, J. The alleged libelous publication which is the subject of this action was contained in the Troy Times of September 15, 1882, in an article written on the occasion of rumors of trouble in the financial condition of the Manufacturers' National Bank of Troy, of which the plaintiff was, at the time of the publication, and for eighteen years prior thereto had been, teller. The rumors referred to had caused a "run" upon the bank, and it is claimed by the defendants, and it is the fair conclusion from the evidence, that the primary motive of the article was to allay public excitement on the subject.

That part of the publication charged to be libelous is as follows: "Several weeks ago it was rumored that Amasa Moore, the teller of the bank, had tendered his resignation. Rumors at once began to circulate. A reporter inquired of Cashier Wellington if it was true that the teller had resigned, and received in reply the answer that Mr. Moore was on his vacation. More than this the cashier would not say. A rumor was circulated that Mr. Moore was suffering from overwork, and that his mental condition was not entirely good. Next came reports that Cashier Wellington was financially involved, and that the bank was in trouble. A Times reporter at once sought an interview with President Weed of the bank, and found him and directors Morrison, Cowee, Bradwell, and others in consultation. They said that the bank was entirely sound, with a clear surplus of one hundred thousand dollars; that there had been a little trouble in its affairs, occasioned by the mental derangement of Teller Moore; and that the latter's statements, when he was probably not responsible for what he said, had caused some bad rumors."

The complaint is in the usual form, and charges that the publication was false and malicious, made with intent to injure the plaintiff in his good name and credit in his occupation as bank teller, and to cause it to be believed that by

reason of mental derangement he had become incompetent to discharge his duties, and had caused injury to the bank, etc.

The court, on the trial, was requested by the plaintiff's counsel to rule, as a question of law, that the publication was libelous. The court refused, but submitted the question to the jury. The jury found a verdict for the defendants, and as the verdict may have proceeded upon the finding that the article was not libelous, the question is presented whether it was *per se* libelous. If it was, the court erred in leaving the question to the jury. It is the settled law of this state that in a civil action for libel, where the publication is admitted, and the words are unambiguous, and admit of but one sense, the question of libel or no libel is one of law, which the court must decide: *Snyder v. Andrews*, 6 Barb. 43; *Matthews v. Beach*, 5 Sand. 256; *Hunt v. Bennett*, 19 N. Y. 173; *Lewis v. Chapman*, 16 N. Y. 369; *Kingsbury v. Bradstreet Co.*, 116 N. Y. 211. Of course, an error in submitting the question to the jury would be harmless if their finding that the publication was not libelous was in accordance with its legal character. The import of the article, so far as it bears upon the plaintiff, is plain and unequivocal. The words amount to a distinct affirmation,—1. That the plaintiff was teller of the bank; 2. That while acting in this capacity, he became mentally deranged; 3. That the derangement was caused by overwork; 4. That while teller, and suffering from this mental alienation, he made injurious statements in respect to the bank's affairs, which occasioned it trouble.

The cases of actionable slander were defined by Chief Justice De Grey in the leading case of *Onslow v. Horne*, 3 Wils. 177, and the classification made in that case has been generally followed in England and this country. According to this classification, slanderous words are those which,—1. Import a charge of some punishable crime; or 2. Impute some offensive disease which would tend to deprive a person of society; or 3. Which tend to injure a party in his trade, occupation, or business; or 4. Which have produced some special damage.

Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. Actions of slander for the most part are founded upon such imputations; but the action lies in some cases where the words impute no criminal of-

fense, where no attack is made upon the moral character, nor any charge of personal dishonor. The first and larger class of actions are those brought for the vindication of reputation, in its strict sense, against damaging and calumnious aspersions. The other class fall, for the most part, at least within the third specification, in the opinion of Chief Justice De Grey, of words which tend to injure one in his trade or occupation. The case of words affecting the credit of a trader, such as imputing bankruptcy or insolvency, is an illustration. The action is maintainable in such a case, although no fraud or dishonesty is charged, and although the words were spoken without actual malice. The law allows this form of action, not only to protect a man's character as such, but to protect him in his occupation, also, against injurious imputations. It recognizes the right of a man to live, and the necessity of labor, and will not permit one to assail by words the pecuniary credit of another, except at the peril, in case they are untrue, of answering in damages. The principle is clearly stated by Bayley, J., in *Whittaker v. Bradley*, 7 Dowl. & R. 649: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business, are actionable." When proved to have been spoken in relation thereto, the action is supported, and unless the defendant shows a lawful excuse, the plaintiff is entitled to recover without allegation or proof of special damage, because both the falsity of the words and resulting damage are presumed: 1 Saund. 243, note; 1 Am. Lead. Cas. 135.

The authorities tend to support the proposition that spoken words imputing insanity are actionable *per se*, when spoken of one in his trade or occupation, but not otherwise, without proof of special damage: *Morgan v. Lingen*, 8 L. T. 800; *Joannes v. Burt*, 6 Allen, 236. The imputation of insanity in a written or printed publication is *a fortiori* libelous, where it would constitute slander if the words were spoken. Written words are libelous in all cases where, if spoken, they would be actionable, but they may be libelous where they would not support an action for oral slander. There are many definitions of libel. The one by Hamilton, in his argument in *People v. Croswell*, 3 Johns. Cas. 354, viz., "A censorious or ridiculing writing, picture, or sign, made with malicious intent towards government, magistrates, or individuals," has been often referred to with approval; but unless the word "censorious" is given a much broader signification than strictly

belongs to it, the definition would not seem to comprehend all cases of libelous words. The word "libel," as expounded in the cases, is not limited to written or printed words which defame a man, in the ordinary sense, or which impute blame or moral turpitude, or which criticise or censure him. In the case before referred to, words affecting a man injuriously in his trade or occupation may be libelous, although they convey no imputation upon his character. Words, says Starkie, are libelous if they affect a person in his profession, trade, or business, "by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness, or want of any necessary qualification in the exercise thereof": Starkie on Slander, sec. 188.

The cases of libel founded upon the imputation of insanity are few. The declaration in *Morgan v. Lingen*, 8 L. T. 800, contained a count for libel and also for verbal slander. The alleged libel was in a letter written by the defendant, in which he states that "he had no doubt the plaintiff's mind was affected, and that seriously," and also that "she had a delusion," etc. It appeared that the defendant had also orally stated, in substance, the same thing. It was claimed that the writing was justified. The plaintiff was a governess. Martin, B., in summing up to the jury, said that "a statement in writing that a lady's mind is affected, and that seriously, is, without explanation, *prima facie* a libel." In respect to the slander, he said "he thought there was no evidence of special damage. The jury must therefore consider whether the defendant intended to use the expression he did with reference to the plaintiff's profession of governess."

In *Perkins v. Mitchell*, 31 Barb. 465, it was held to be libelous to publish of another, "that he is insane, and a fit person to be sent to the lunatic asylum"; Emott, J., saying: "Upon this point the case is clear." *King v. Harvey*, 2 Barn. & C. 257, was an information for libel for publishing in a newspaper that the king "labored under mental insanity, and that the writer communicated the fact from authority." The judge charged that the publication was a libel, and the charge was held to be correct. The foregoing are the only cases we have noticed upon the point whether a written imputation of insanity constitutes a libel. Several of the text-writers state that to charge in writing that a man is insane is libelous: Addison on Torts, 768; Townshend on Slander, sec. 177; Starkie on Slander, 164; Odgers on Libel and Slander, 23.

The publication now in question is not simply an assertion that the plaintiff is or has been affected with "mental derangement," disconnected with any special circumstances. The assertion was made to account for the trouble to which the bank had been subjected by reason of injurious statements made by the plaintiff while in its employment. Words, to be actionable on the ground that they affect a man in his trade or occupation, must, as is said, touch him in such trade or occupation; that is, they must be shown, directly or by inference, to have been spoken of him in relation thereto, and to be such as would tend to prejudice him therein: *Sanderson v. Caldwell*, 45 N. Y. 405; 6 Am. Rep. 105. The publication did, we think, touch the plaintiff in respect to his occupation as bank teller. It imputed mental derangement while engaged in his business as teller, which affected him in the discharge of his duties. The words conveyed no imputation upon the plaintiff's honesty, fidelity, or general capacity. They attributed to him a misfortune brought upon him by an overzealous application in his employment. While the statement was calculated to excite sympathy, and even respect, for the plaintiff, it nevertheless was calculated also to injure him in his character and employment as a teller. On common understanding, mental derangement has usually a much more serious significance than mere physical disease. There can be no doubt that the imputation of insanity against a man employed in a position of trust and confidence such as that of a bank teller, whether the insanity is temporary or not, although accompanied by the explanation that it was induced by overwork, is calculated to injure and prejudice him in that employment, and especially where the statement is added that in consequence of his conduct in that condition the bank had been involved in trouble. The directors of a bank would naturally hesitate to employ a person as teller whose mind had once given way under stress of similar duties, and run the risk of a recurrence of the malady. The publication was, we think, defamatory in a legal sense, although it imputed no crime and subjected the plaintiff to no disgrace, reproach, or obloquy, for the reason that its tendency was to subject the plaintiff to temporal loss, and deprive him of those advantages and opportunities as a member of the community which are open to those who have both a sound mind and a sound body. The trial judge therefore erred in not ruling the question of libel as one of law. The evidence renders it clear that no

actual injury to the plaintiff was intended by the defendants; but it is not a legal excuse, that defamatory matter was published accidentally or inadvertently, or with good motives and in an honest belief in its truth.

The judgment should be reversed, and a new trial granted.

LIBEL — QUESTION FOR THE COURT. — In the absence of doubt or ambiguity in the language used, it is the duty of the court to determine and to instruct the jury whether or not it is libelous; but when doubt or uncertainty exists, it is the duty of the court to define libel, and leave the jury to determine whether the offense has been proved: *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819, and note.

LIBEL. — The law of newspaper libel is thoroughly discussed in an elaborate note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333-369.

LIBEL — JUSTIFICATION. — A belief in the truth of a libelous charge does not justify its publication, if it is false and injurious, and not a privileged communication: *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102.

WHAT WORDS ARE LIBELOUS. — Words published which tend to prejudice one in his employment or business are libelous: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874, and note.

MANCHESTER v. TIBBETTS.

[121 NEW YORK, 219.]

HUSBAND AND WIFE, BUSINESS TRANSACTIONS BETWEEN. — When a wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same remedies, and has the same standing to enforce any security for the payment of her debt she may receive, as any other creditor.

HUSBAND'S MORTGAGE TO HIS WIFE TO SECURE A DEBT BARRED BY THE STATUTE OF LIMITATIONS is valid, because he is not obliged by any duty to his creditors to interpose the plea of the statute of limitations.

EXECUTION. — MORTGAGOR OF CHATTELS, after default in payment of debt and after the mortgagee has taken possession, has no interest subject to execution, and a levy, though it purports to be only on the interest of the mortgagor, will, when coupled with a refusal of the officer to surrender the goods to the mortgagee, render him liable as for their conversion.

ACTION for the conversion of personal property. Judgment in favor of plaintiff.

D. F. Van Vleet, for the appellant.

Simson Smith, for the respondent.

O'BRIEN, J. The plaintiff recovered the value of certain articles of personal property which she claimed had been transferred to her by her husband by means of a chattel mort-

gage. This instrument was dated October 28, 1886, and on the same day was filed in the county clerk's office. It purported upon its face to have been given to secure the payment, in one day after date, of the sum of \$1,016.06, due and owing by the husband to the wife. The instrument transfers numerous articles of personal property then in the possession of the husband, who kept a saloon and cigar-store. It contained the usual clause authorizing the mortgagee, in case payment should not be made when due, or in case the mortgagee should at any time deem it unsafe, to take possession of the property and sell the same at public or private sale, and apply the proceeds to the satisfaction of the debt.

The defendant justified the taking of the property under a judgment confessed by the husband to certain of his creditors on December 4, 1886, upon which execution was issued to the defendant as sheriff, and by virtue of which he seized and sold the property as that of the husband.

On the trial of the action before a referee, the main issue litigated was the purpose and consideration of the chattel mortgage through which the plaintiff derived her title. The contention on the part of the defendant was that this instrument was fraudulent, and considerable proof was given to support that charge. On the other hand, both the plaintiff and her husband were sworn, and they testified that when the mortgage was given, the husband actually and honestly owed his wife the sum mentioned therein, and to secure the payment of which the transfer of the property was made.

The referee has found that the indebtedness mentioned in the mortgage actually existed, and was due by the husband to the plaintiff, his wife, and further, that the mortgage was given for the purpose of securing the payment of this debt, and without any intent to hinder, delay, or defraud creditors. This finding, and the judgment entered upon the report of the referee, has been sustained by the general term.

As the case stood upon the pleadings, it involved simply a question of fact, namely, whether the mortgage was given for the purpose of defrauding creditors, or securing to the plaintiff the payment of an existing debt which her husband was morally, at least, if not legally, bound to pay. The defendant lays much stress upon the statute (2 R. S. 136, sec. 5) which provides that "every sale made by a vendor of any goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or

security, or upon any condition whatever, unless accompanied by an immediate delivery, and followed by an actual or continued change of possession of the thing sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or of the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud creditors."

This statute put upon the plaintiff the burden of showing that the transfer to her by her husband was in good faith, and without any fraudulent intent. She has, however, complied with its requirements, as she has satisfied the referee on these issues. He has not only found that the transfer was in good faith, and without any fraudulent intent, but also that before the defendant levied upon the goods plaintiff took possession of them, and that there was a change of possession. Dealings between husband and wife which result in the appropriation of the husband's property for the payment of a debt claimed to be due to the wife, to the exclusion of other creditors, it must be admitted, furnish uncommon opportunities for the perpetration of fraud, and should be carefully and rigidly scrutinized. The wife, in this case, seems to have fairly proved the indebtedness. True, some of it was of long standing; but the husband was not obliged, by any duty he owed his other creditors, to interpose the statute of limitations as a defense. When the wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same remedies, and has the same standing to enforce any security for the payment of the debt that she may have received, as any other creditor. The question of fraudulent intent is made by the statute one of fact, and not of law; and after a full investigation of the origin and history of the debt, to secure which the transfer was made, and the circumstances attending the transfer itself, from which a fraudulent intent was sought to be shown by the defendant, the referee has found the facts for the plaintiff. It is not claimed that any of his findings are unsupported by evidence, and therefore this court has no power to review them. Assuming, as we must, that the referee's report expresses the truth in regard to the transaction, the case was correctly decided. The result reached in the court below is in harmony with a recent decision of this

court in a case involving facts similar, and like principles of law: *Stanley v. National Union Bank*, 115 N. Y. 122.

The plaintiff having, after the defendant's levy upon the property, demanded that it be surrendered and delivered to her, and the defendant, having refused to so surrender or deliver, became liable for its conversion. As the husband, the mortgagor, had made default in the payment of the mortgage, and it was past due, he had no interest in the goods subject to levy or sale on execution: *Hull v. Carnley*, 11 N. Y. 502; *Hall v. Sampson*, 35 N. Y. 274; 91 Am. Dec. 56; *Galen v. Brown*, 22 N. Y. 37.

Moreover, upon the findings of the referee, the plaintiff had, before the levy by defendant, taken possession of the property under her mortgage, and the debtor in the execution had, therefore, neither title, possession, nor the right of possession; and though the defendant assumed to levy only on such interest as the husband had in the property, yet that fact, coupled with his refusal to surrender the goods to the plaintiff, subjected him to liability. Whatever may have been the merits of the defendant's position in this case originally, it depended entirely upon facts which the referee and the general term have determined against him.

The record before us does not show any error of law that would justify a reversal of the judgment, and it must therefore be affirmed.

HUSBAND AND WIFE — STATUTE OF LIMITATIONS. — In California, Illinois, Maine, New York, and Ohio, the effect of the statutes is to take a married woman out of the exception of the statute of limitations in all cases where the husband is not a necessary party to the suit: Note to *Moore v. Armstrong*, 36 Am. Dec. 71.

HUSBAND AND WIFE, CONTRACTS BETWEEN. — As to the power of husband and wife to make contracts with each other, and the validity of such contracts under the various state laws, see note to *Kantrowitz v. Prather*, 99 Am. Dec. 599-601; see also note to *Kirkpatrick v. Buford*, 76 Am. Dec. 389, 390.

EXECUTION, WHAT SUBJECT TO. — Chattels in the hands of the mortgagor, after the condition of the mortgage is broken, are not subject to execution: *Ex parte Lorenz*, 32 S. C. 365; 17 Am. St. Rep. 862, and note.

PEOPLE v. McELVAINE.

[121 NEW YORK, 250.]

EXPERT WITNESSES, QUESTION TO, MUST NOT LEAVE THEM TO DETERMINE TRUTH OF EVIDENCE. — Expert witness who has heard the evidence on the trial of one accused of murder, and whose defense is that he was insane at the time of the homicide, should not be permitted to answer whether, upon all the testimony, the acts of the defendant on the night of the homicide, and upon the testimony as to his past life given by the witnesses in his defense, he is insane, because such question leaves the expert not only to recollect the evidence for himself, but also to determine the credibility of the witnesses, and the probability or improbability of their statements.

EXPERT WITNESSES.—OPINIONS OF EXPERT WITNESS MUST BE BASED UPON HYPOTHETICAL QUESTIONS containing facts assumed to have been proven, and not upon what he had heard other witnesses testify.

George M. Curtis, for the appellant.

James W. Ridgway, for the respondent.

RUGER, C. J. The defendant, upon trial, was convicted of the crime of murder in the first degree, for having killed one Luca, in his own house, in Brooklyn, about three o'clock in the morning of the twenty-third day of August, 1889. The evidence showed that the defendant entered the house through a window in the second floor, by means of a ladder which he found on the premises, and that such entrance was effected by forcibly removing a wire screen from the window. Access to this window was obtained from a back yard into which an unlocked gate opened from the street. The deceased was killed by stabs with a knife, inflicted upon him while endeavoring to forcibly prevent the escape of the accused from the room which he first entered. Twelve stabs were given, of which four were described to have been mortal. The defendant was positively identified by two persons who saw him in the act of inflicting the wounds, and was immediately arrested by the police-officers, in the street, near the gate, within one hundred feet of the premises, with a bloody knife in his possession. Independent of the confession subsequently made by the defendant to the police-officers and others, no doubt could possibly be entertained, on the evidence, as to the identification of the accused as the person who committed the homicide. No effort was, therefore, made on the trial to show that he was not the person who caused the death of Luca.

The sole defense attempted was the alleged insanity of the accused. Considerable evidence was given on the trial, in his

behalf, tending to show that he possessed a defective mental organization, and was subject to delusions and hallucinations, which were claimed to be evidence of his insanity. Two witnesses were called on his behalf, as experts, who respectively gave evidence tending to show a belief that he was, to a certain degree, insane. Two expert witnesses were also called on behalf of the prosecution, to give opinions upon the question of the defendant's sanity, and each testified that he was, in their opinion, sane. It cannot be questioned but that the evidence of these witnesses was material, and had weight with the jury upon the question of the defendant's mental condition. If these opinions were based upon an erroneous hypothesis, and were founded in any material respect upon indefinite or unascertainable conditions, or upon considerations which were not the proper subject of expert evidence, they must be regarded as having been erroneously admitted.

The only serious objection to the convictions arises upon an exception to the ruling of the court permitting Dr. Gray, a witness for the prosecution, and an expert of high reputation and character, to answer, against objection, a hypothetical question as to the defendant's sanity. The question put by the district attorney, and the proceedings accompanying the question, were as follows:—

“Q. Now, are you able to say whether, in your judgment, based upon all the testimony, the acts of the defendant on the night of the homicide, the testimony as to his past life given by the witnesses in his defense, and based upon the whole case, whether this young man is sane or insane?

“Mr. Curtis. — I object, as it is not a question properly put.

“The Court. — Why not?

“Mr. Curtis. — It is too vague and indefinite. In order to put a hypothetical question properly, so say the court of appeals, it must consist of specifically proven facts, which come within the pale of the proof; not where a person, for instance, is permitted to give an anomalous opinion.

“The Court. — You had better frame the question.

“Mr. Ridgway. — Then I will ask the stenographer to read all the evidence to this witness.

“The Court. — I don't see why the question is not competent.

“Mr. Curtis. — The way is, to take compact, substantial, concentrated oral proof what the learned counsel relies on to prove the defendant insane.

"The Court. — Where a medical witness who is called as an expert has been in court during the whole trial and heard all the testimony in the case, everything that has been done and said by everybody, I don't see why it is not competent to ask him whether, upon those facts, all he heard testified to, he thinks the defendant is sane or insane. This witness has heard all that has been sworn to by everybody.

"To the witness: You have heard all the testimony in the case.

"The District Attorney. — Based upon the whole testimony of the prosecution and the defense, including the hypothetical question put by Judge Curtis, and everything that you have heard sworn to here, now will you answer the question?

"The defense excepts.

"A. I have formed an opinion.

"Q. State it.

"The defense excepts.

"A. I believe the defendant is sane.

"Q. What do you believe he was at the time of the commission of the offense?

"A. I believe he was sane at the time of the commission of the offense."

We cannot doubt but that this question was improper. The witness was thus permitted to take into consideration all the evidence in the case given upon a long trial extending over nine days, and, upon so much of it as he could recollect, determine for himself the credibility of the witnesses, the probability or improbability of their statements, and drawing therefrom such inferences as, in his judgment, were warranted by it, pronounce upon the sanity or insanity of the defendant. It cannot be questioned but that the witness was, by the question, put in the place of the jury, and was allowed to determine upon his own judgment what their verdict ought to be in the case.

It hardly needs discussion or authority to show the impropriety of this question, and indeed the learned trial judge, at a subsequent stage of the proceedings, emphatically protested against the implication that he had permitted such a question to be put to the witness. A reference to the record, however, shows that the court must then have been laboring under some misconception as to what had really taken place. This might reasonably have happened to any judge from the prejudice excited by the exasperating mode in which the defense

was conducted by the prisoner's counsel. The rule as to the conditions governing the formation of hypothetical questions to experts has frequently been discussed and illustrated in the reported cases in this court.

It was said by Judge Andrews in the case of *People v. Barber*, 115 N. Y. 475, 491, that "the opinion of medical experts as to the sanity or insanity of the defendant, based upon testimony in the case, assumed for the purpose of the examination to be true, was undoubtedly competent. So in connection with their opinion, they could be permitted to state the reasons upon which it was founded. But inferences from facts proved are to be drawn and found by the jury, and cannot be proved as facts by the opinion of witnesses."

In *Reynolds v. Robinson*, 64 N. Y. 589, 595, Judge Earl, in speaking of evidence attempted to be given under a hypothetical question, says: "In such a case it is not the province of the witness to reconcile and draw inferences from the evidence of other witnesses, and to take in such facts as he thinks their evidence has established, or as he can recollect and carry in his mind, and thus form and express an opinion. His opinion may be obtained by stating to him a hypothetical case, taking in some or all of the facts stated by witnesses, and claimed by counsel putting the question to be established by their evidence, and when the question is thus stated the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with." So, too, it was said by Judge Miller in *Guiterman v. Liverpool etc. S. S. Co.*, 83 N. Y. 358, that it is not the province of an expert witness "to draw inferences, or to take in such facts as he can recollect, and thus form an opinion."

In *Gregory v. New York etc. Ry Co.*, 28 N. Y. Super. Ct. 726, the court say: "An expert witness cannot be asked to give an opinion based upon what he has heard other witnesses testify. Such opinion must be based on a hypothetical question containing facts which are assumed to have been proven." The case of *People v. Lake*, 12 N. Y. 358, is not an authority for appellant on the question under discussion. The court in that case did not concur in the opinion written, but placed their decision upon two propositions, one of which only bears upon the question here, and that was, that "the court of oyer and terminer erred in permitting physicians, who did not hear all the evidence relating to the mental condition of the prisoner, to give opinions as to his sanity, founded on the portion

heard by them." The question was not mooted or decided whether, in case they had heard all of the evidence, they could give opinions based thereon, but it passed off solely upon the question whether a person who had heard only a part of the evidence upon a trial could give an opinion based upon the portion of the evidence so heard by him. It is true that an implication may be drawn from the decision that if the witness had heard the whole evidence he might properly have given his opinion; but that question was not in the case, and it falls far short of being an authority on the point.

The case of *Sanchez v. People*, 22 N. Y. 147, 150, is to a similar effect. Two opinions were delivered in that case, but neither of them secured the concurrence of the court. The decision was placed upon the decision in the Hartung case, and had no reference to the question under consideration here. The case of *People v. Thurston*, 2 Park. Cr. 49, was in the supreme court, and failed to secure the concurrence of the court in the grounds upon which it was decided. No rule was therefore legally formulated by the decision, but the inferences to be drawn from the opinions read are plainly opposed to the people's contention here. No other decisions from this state are cited, and we deem it unnecessary to discuss or consider the rules prevailing in other countries in view of the reported decisions made in our own courts.

An attempt was subsequently made to in some degree cure the error committed, by proving by the witness that in answering the question he assumed the truth of the evidence given by the defendant's witnesses; but we think this did not remove the vice inhering in the question. Even as thus affected, it left the uncertainty of his memory as to all of the evidence in the case, and the freedom of his judgment as to all other evidence, to give such weight as he should in his own mind determine it was entitled to, and substantially allowed him to usurp the functions of the jury in deciding the questions of fact.

We think it is not competent in any case to predicate a hypothetical question to an expert upon all of the evidence in the case, whether he has heard it all or not, upon the assumption that he then recollects it; for it would then be impossible for the jury to determine the facts upon which the witness bases his opinion, and whether such facts were proved or not. Suppose the jury concluded that certain facts are not proved, how are they, in such an event, to determine whether

the opinion is not, to a great degree, based upon such facts? When specific facts, either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not, and whether other facts bearing upon the correctness and force of the answer are contained therein, or have been omitted from it; but in the absence of such a question, the evidence must always be, to a certain extent, uncertain, unintelligible, and perhaps misleading.

We regret that an error of this character is found in a case which was otherwise tried by the learned court with an intelligent understanding of and adherence to the rules of law applicable to the case, and a strict regard to the rights of the accused; but, in compliance with the uniform practice of courts in capital cases to avoid even the possibility of injustice to the accused, we think the error referred to requires a new trial.

EXPERT WITNESSES. — An expert witness, in giving his opinion on a hypothetical case, must not be called upon to pass upon disputed facts; nor must he give his opinion, based upon evidence that he has heard: Note to *Quinn v. Higgins*, 53 Am. Rep. 307-309. Where the evidence is voluminous or contradictory, it is error to permit an expert to give his opinion as to what the facts as sworn to by the witnesses indicate: *Bennett v. State*, 57 Wis. 69; 46 Am. Rep. 26.

SCHULTZ v. GRIFFIN.

[121 NEW YORK, 294.]

AUTHORITY TO SELL, CONSTRUCTION OF. — Authority to sell a parcel of real estate for a sum specified to be paid as follows: A designated sum on a first mortgage, another sum on a second mortgage, and the balance to the owner on a day named, — does not authorize a sale whereby the purchaser agrees to assume the mortgages, and to pay the balance at the time mentioned in the contract, because it leaves the vendor personally liable on the mortgage debts.

WARRANTY OF TITLE TO REAL ESTATE, POWER OF AGENT TO MAKE. — A power without restriction to sell and convey real estate gives authority to the agent to contract for a conveyance with general warranty binding on the principal, where under the circumstances this is a common and usual mode of assurance.

ACTION upon a contract in the words and figures following:—

"I hereby agree to pay to Byron M. Shultz the sum of one thousand dollars, providing he will dispose of or sell my farm

on Main Street, Buffalo, N. Y., known as the Owens place, consisting of 86½ acres of land, more or less, for the sum of twenty thousand dollars, to be paid for as follows: Buffalo Savings Bank 1st mortgage, \$5,000; 2d mortgage held by M. Williams, \$2,500; the balance to be paid to Philip Griffin in cash April 1, 1887, said Schultz to have the exclusive sale for 20 days, one thousand dollars to be paid at time of making contract.

“PHILIP ^{his} X _{mark} GRIFFIN.

“BUFFALO PLAINS, July 31, 1886.”

Within twenty days after the execution of the contract, Schultz procured one Longnecker to enter into a written contract of purchase, which contract contained a clause as follows: “This agreement is upon the express condition, viz., the said party of the second part (Longnecker) shall first pay to the said party of the first part (Griffin), or his legal representatives, the full sum of twenty thousand dollars in manner following, that is to say, one thousand dollars in cash on the execution of the contract, and the balance, \$19,000, by assuming a mortgage to the Erie County Savings Bank for \$5,000, also a mortgage held by M. Williams for \$2,500, and \$11,500 to be paid in cash April 1, 1887, which sum or sums, at the time and in the proportion before stated, with lawful interest on all sums unpaid.” The contract also purported to bind the vendor, Griffin, on payment to convey the premises to the purchaser by good and sufficient deed of warranty. When the plaintiff, Schultz, tendered this contract to the defendant Griffin, together with the check for one thousand dollars, the defendant refused to accept either the contract or check, and afterwards sold the property to another person. Judgment in favor of the plaintiff for one thousand dollars was affirmed by the general term. The defendant appealed.

John G. Milburn, for the appellant.

Warren F. Miller, for the respondent.

ANDREWS, J. The principal point urged for the reversal of the judgment is, that the contract tendered to the defendant, whereby Longnecker agreed to pay such portion of the purchase-money as was represented by the mortgage to the Buffalo Savings Bank and the mortgage to Williams, “by assuming” those mortgages, was not a compliance with the terms upon which Schultz was employed to sell the farm. It is insisted that his authority extended only to a sale in which the pur-

chaser should absolutely pay and discharge the mortgages, and that the agreement made by Longnecker would be satisfied by his paying the portion of the purchase-money over and above the mortgages to Griffin personally, and by his assent to a covenant in the deed of the farm to assume the mortgages.

The agreement between Schultz and the defendant is not free from ambiguity. The price for which the farm was to be sold is fixed, and the agreement proceeds to specify that the purchase-money should be paid, a part to Griffin personally and a part on the mortgages. The language as to the payment of the mortgages may be susceptible of two meanings, according to extrinsic circumstances.

It appears that the mortgages were accompanied by bonds of Griffin. He had an interest that the mortgages should be paid to relieve him from his liability on the bonds. On the other hand, the contemplated purchaser would have an interest to apply so much of the purchase-money as was required for that purpose, to the extinguishment of the mortgages. In the absence of any circumstances indicating a different interpretation, and regarding alone the language of the contract, the most natural meaning would seem to be that actual payment of the purchase-money, part to Griffin personally and part on the mortgages, was to be made before any conveyance by Griffin. It seems quite clear that if the Longnecker contract had been accepted and signed by Griffin, the latter would have been bound to convey on receiving eleven thousand five hundred dollars in cash and the covenant of Longnecker assuming the mortgages. Such a transaction would have left Griffin still liable on his bonds, with his liability changed in equity to that of surety for Longnecker for the mortgage debts: *Ayers v. Dixon*, 78 N. Y. 318.

It does not appear whether the mortgages were or were not due. If it had appeared that they had not matured, so that they could not have been paid without the consent of the holders, we are inclined to think that the contract with Schultz would be construed as an authority to sell the land subject to the mortgages. It could not reasonably be supposed in such case that Griffin, who, as the contract shows, was seeking to sell his farm, would have inserted an impossible condition, or one which could not be performed except by the consent of the holders of the mortgages. But the case gives no light upon this point, and as the burden was upon the plaintiff to

show that the contract with Longnecker was such a one as was authorized by the agreement with Griffin, we are of opinion that judgment was erroneously given for the plaintiff.

The further point is made that Schultz was not authorized to make it a condition of the sale that the conveyance should be with warranty. The defendant's counsel cites, in support of this point, *Nixon v. Hyserott*, 5 Johns. 58, which supports his contention.

The rule that an agent to sell personal property has implied power to warrant, in the absence of any restriction, where sale with warranty is usual and customary in similar cases, was declared in *Nelson v. Cowing*, 6 Hill, 336, substantially overruling *Gibson v. Colt*, 7 Johns. 390.

There seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases. The great preponderance of authority now is, that a power without restriction to sell and convey real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance: *Le Roy v. Beard*, 8 How. 451; *Peters v. Farnsworth*, 15 Vt. 155; 40 Am. Dec. 671; *Vanada v. Hopkins*, 1 J. J. Marsh. 293; 19 Am. Dec. 92; *Taggart v. Stanbery*, 2 McLean, 543; Rawle on Covenants, sec. 20, note.

It is sufficient, however, for the disposition of this appeal that the first point considered must prevail.

The judgment should be reversed, and a new trial ordered.

REAL ESTATE AGENT'S AUTHORITY UNDER A GENERAL EMPLOYMENT TO SELL. — A general authority to a real estate agent to sell realty is merely an authority to find a purchaser, and not to conclude and execute a contract binding upon his principal: *Duffy v. Hobson*, 40 Cal. 240; 6 Am. Rep. 617; note to *Walker v. Osgood*, 93 Am. Dec. 172.

HEARTT v. KRUGER.

[121 NEW YORK, 386.]

PARTY-WALL.—Upon the destruction of buildings, and of a party-wall between them, the mutual easements in such wall become inapplicable, and each proprietor may thereafter build as he pleases on his own land, without any obligation to accommodate the other.

John Hardy, for the appellant.

James J. Thomson, for the respondent.

GRAY, J. The plaintiff and defendant are owners of adjoining lots of land in the city of New York, and their litigation, in the shape of an action of ejectment, is over the question of whether or not their tenements are subject to a perpetual party-wall easement, dominant as to the defendant's and servient as to the plaintiff's properties.

This question, as it is presented by the case before us, does not seem to have arisen before in our courts, though there are several reported cases which, I think, suggest the principle of decision. Some are referred to in the well-considered opinion of Judge Ingraham, speaking for the general term below.

I think, indeed, we might leave the decision of this case with his opinion, were it not for the importance which, perhaps, the question involved possesses for real estate owners in cities. That consideration fairly warrants some expression of the views which lead us to uphold the judgments of the courts below.

In 1874 these lots were owned by one Burchell. He erected upon them two buildings, five stories in height, with a party-wall dividing them of twelve inches in width. He conveyed both premises to one Falk, and took back from his grantee a mortgage on the lot now owned by this defendant, which described the westerly line of the lot as "running southerly and parallel with Tenth Avenue and partly through the center of a party-wall fifty feet and five inches to the northerly side of Fifty-fourth Street." With this conveyance of both lots, and the contemporaneous mortgaging of one of them, commenced the severance of the tenements, and whatever rights or easements have existed, with respect to the division wall which partly supported both houses, they took their rise and form in those transactions.

Through the conveyance upon a foreclosure sale of the mortgaged premises, and other mesne conveyances, the defendant

acquired his title. In 1887, the buildings on both lots were wholly burned down, and only the foundation or cellar-wall remained, upon which had been erected the party-wall; and it was while the premises were in that condition that this defendant became their owner. He then built upon them, erecting upon the old foundation-wall a party-wall two stories high, and of the same thickness as the former one. This erection of the new wall partly upon the adjoining lot was without any other right in the defendant than was to be found in the conditions of his title. There is some pretense of an estoppel upon the plaintiff, by reason of interviews with her husband upon the subject of rebuilding; but there is no foundation for that defense, or for the defense of acquiescence, and we need not stop to consider that feature. The question thus arises as to whether, after the destruction of the buildings by fire, any right remained in the defendant, as appurtenant to his property, under which he could claim the continuance of an easement in the plaintiff's property for the support of another party-wall. Where will we find the legal foundation for such a claim? There had certainly been no agreement, and there was no express grant, of any easement in the land by the common owner, Falk, and I do not see how any grant arose, by implication, from his mortgaging the lot now owned by the defendant. The only language in the mortgage capable of such an implication was in the description of the westerly boundary, which I have quoted above. That, however, was merely language of description, and while sufficient to create a servitude in the adjoining lot for the purpose of the existing party-wall, was insufficient to predicate any grant of a perpetual easement upon. It was merely the statement of the fact that the dividing line of the two lots ran through the center of what was a party-wall. So that the claim of the defendant to a continued easement in the plaintiff's land must depend wholly upon this reasoning; namely, that a party-wall had formerly existed there, and that because the foundation-wall remained, that fact sufficed to preserve, unimpaired, the right to a reconstruction of the party-wall. The defendant insists that the wall did not cease to be a party-wall after the fire; and he cites, in support of his position, *Brondage v. Warner*, 2 Hill, 145. His argument amounts to this, in effect: that if any fragment of the wall was left, or if only the foundation, or cellar-wall, upon which it stood, remained, in the legal vision the party-wall still stood, with its accompanying bur-

den, or benefit, to the adjoining properties. But that I consider a doctrine untenable, and clashing with the doctrine of property rights in land. *Brondage v. Warner*, 2 Hill, 145, affords no support for it, for there the defendant's right to use and occupy the wall in question lay in grant. The deed under which the defendant in ejectment claimed the right to continue to use the wall granted the right to build upon and occupy it. That had been done. The fire which had destroyed the plaintiff's store left the wall standing, which was occupied by the defendant. It still answered the purpose for which its use had been deeded, and therefore the court held that the right to continue to use it had not been affected. The facts of this case are quite different. When the title to these two lots was severed by their conveyance to separate persons, the purchaser of each lot is presumed to have contracted in reference to the condition of the property at the time, and the openly existing arrangement of a party-wall could not be changed, so long as it stood, and answered its purpose. It was made a party-wall upon the severance of the title by the description of the boundary line; but the whole extent of the qualification, which resulted as to each lot-owner's title, was the easement which the other acquired in the wall dividing and supporting their respective buildings. Each was bound to preserve the existing order of things in that respect, and neither had any right to change the relative condition of his building to the injury of the adjoining one. The party-wall of the two buildings was an open and visible condition of the ownership of the property, and in legal contemplation, its use, as such, while the buildings stood, was an element which entered into the contract of the purchaser, and which charged the land with a servitude. This principle of obligation is asserted in several cases, of which I only cite *Lampman v. Milks*, 21 N. Y. 507; *Curtiss v. Ayrault*, 47 N. Y. 79; and *Rogers v. Sinsheimer*, 50 N. Y. 646. But upon the destruction of the buildings, the tenements reverted to their original or primary conditions of ownership. Their tenure was no longer qualified by the relative rights and obligations which previously existed.

In the early case of *Sherred v. Cisco*, 4 Sand. 485, the facts were quite similar to those in this record. Adjoining buildings were destroyed by fire, and nothing was left of a party-wall but the stone foundation. The plaintiff rebuilt on his lot, and when the defendant also rebuilt, he made use of the

wall for his buildings which plaintiff had erected on the old foundation. Thereupon plaintiff sued to recover of defendant his contribution towards the expense of the erection, and failed in his suit. In his opinion, Judge Sanford held that the agreement under which the party-wall had been built related to that wall only, and he said "that when the owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer from that act an agreement, binding upon them and their heirs and assigns to the end of time, to erect another like party-wall, at their mutual expense, when that one is casually destroyed, and so on as often as the new one shares the same fate." The principle of that decision I think was a correct one, and it may be well applied here. The implied agreement that the party-wall existing at the time of the conveyances of the two lots by their common owner should continue in its use and occupancy as such cannot be extended so as to relate to a changed condition of things, caused by the casual destruction of the wall and buildings. In *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632, Judge Denio, in his opinion upon the case, approves of Judge Sanford's opinion in the case cited. He held that upon the occurrence of a state of affairs rendering the party-wall useless in its then condition, "the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other." The facts of that case were not, of course, similar; for the action related to the right of the tenant of a building to recover damages for injuries to goods, etc., occasioned during the rebuilding, by the defendants, of a division-wall. The case turned upon the necessity for the removal of the old and the rebuilding of a new wall. But the opinions are instructive upon the subject before us, however unnecessary, in that respect, to the decision of that particular case. Very appropriately to this case, Judge Denio remarked, also, in his opinion, that "in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions and of an entirely different character would be required. And it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings would essentially differ from the other, and the division-wall which would suit one of them would be inapplicable to the objects of the other."

The rule which, with the cessation of the necessity for the existence of a right, abrogates the right itself, is supported by the reason of the thing, as well as by legal principles. The mutual easements existed by force of the situation at the time of the severance of the ownership of the two lots, and with the change in that situation produced by the casual destruction of the buildings, the reason for their existence ceased. Thenceforth they were inapplicable, and the lands were free for the lawful uses of their owners. The easement was measured, in its extent and duration, by the existence of the necessity for it. When the necessity ceased, as it did by the destruction of the buildings and wall, the rights resulting from it ceased also: *Ogden v. Jennings*, 62 N. Y. 531.

In *Holmes v. Goring*, 2 Bing. 76, that principle was laid down in the case of a right of way.

Without further discussion of principle or authorities, I think the judgment appealed from was clearly right, and therefore should be affirmed, with costs.

PARTY-WALL, DESTRUCTION OF.—Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of his part on the ground: *Hoffman v. Kuhn*, 57 Miss. 746; 34 Am. Rep. 491. In case the party-wall itself is destroyed by fire, there is no implied obligation to contribute toward rebuilding it: *Antomarchi v. Russell*, 63 Ala. 356; 35 Am. Rep. 40.

CASWELL v. HAZARD.

[121 NEW YORK, 424.]

TRADE-MARK, AFTER THE DISSOLUTION OF PARTNERSHIP.—Upon dissolution of a firm having established trade-marks, and a good-will which has not been disposed of upon such dissolution, each member of the late firm may lawfully use such trade-marks in the prosecution of his business.

PRACTICE ON APPEAL.—If a judgment is reversed, and a new trial ordered by the general term, on questions both of law and of fact, such judgment of reversal must be affirmed if the record presents any error either of law or of fact made by the trial court.

TRADE-MARKS.—THE RIGHT OF EVERY PERSON TO USE HIS OWN NAME in the prosecution of his business cannot be disputed or limited, unless such name has become the trade-mark or business sign of another, or is being used to deceive the public or defraud the person who made it valuable.

PARTNERSHIP TRADE-MARKS.—THE RIGHT TO A TRADE-MARK IS DERIVED FROM ITS APPROPRIATION AND CONTINUED USER, and becomes the property of those who first gave it a name and reputation. It becomes
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a part of the assets of the firm by which it was used and established, and can be owned, transferred, and sold like other species of property.

TRADE-MARK OF WHICH THE NAME OF THE MEMBERS OF A FIRM IS PART may, upon the dissolution of the firm, without disposing of it, be used by either member, and neither has, after such dissolution, any such exclusive right to the use of his own name as entitles him to the aid of equity to prevent the use by either of the trade-marks of the late firm, of which the names of both members were a part.

TRANSFER OF PROPERTY UPON WHICH A TRADE-MARK IS INDELIBLY IMPRESSED OR IMPRINTED, of which the name of the vendor is a part, and which property is known to be intended for sale, gives the vendee the right to sell such property with such trade-mark thereon, and the vendor has no right to restrain such sale because the property bears such trade-mark including his name as a part thereof.

TRADE NAME, RIGHT OF MEMBERS REMAINING IN THE FIRM TO USE.—Such members of a dissolved firm having acquired an established reputation for the character and quality of goods manufactured and sold by them, who desire to continue in business under the former firm name, have a right to do so, although none of the parties continuing in business bear the names contained in the original firm; but to retain this right, the persons continuing in the firm must comply with the requirements of the statutes of this state relating to that subject.

William H. Arnoux, for the appellants.

Henry H. Anderson, for the respondents.

RUGER, C. J. We think the case of *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198, is a controlling authority on this appeal upon the question of the respective rights of the plaintiff Caswell and the defendant Rowland N. Hazard in the use of the name of "Caswell" as a trade-mark in a business carried on by either of them. It was there held, upon the dissolution of a firm having established trade-marks, and a good-will which had not been disposed of or transferred upon such dissolution, that such assets remained the property of the individual members, and could lawfully be employed thereafter by either of such members in the prosecution of his business. It was further determined, that the dissolution of the partnership of "Caswell, Hazard, & Co.," in 1876, and the transfers and agreements then made between the partners, did not dispose of the trade-marks of the firm, and that John R. Caswell and Rowland N. Hazard each possessed the right thereafter to use and employ those formerly belonging to the firm, as he desired to do, without infringing upon the rights of the other. We are entirely satisfied with the correctness of that decision, and feel no disposition to impair its force as an authority upon the questions then decided. Although I did not concur in that decision, my dissent did not proceed upon any

doubt as to the soundness of the principle above stated. We think the facts in this case bring it directly within the operation of the rule there laid down. Both the plaintiff John R. Caswell and the defendant Rowland N. Hazard were, on July 31, 1876, and for ten years previously thereto had been, members of the firm of Caswell, Hazard, & Co., carrying on the business of manufacturing and selling, in Newport and New York, drugs, etc., and during that time, as such firm, used and enjoyed all the privileges which are now claimed by the respective parties to this action. It would seem, therefore, to follow, as a matter of course, that either of the members of such firm could, after its dissolution, lawfully use its trade-marks in any business thereafter carried on by him.

A brief history of the organization of that firm, and its mode of prosecuting business, exhibits the relation these parties respectively bore to the trade-marks of the firm at the time this suit was commenced. Previous to the year 1867, the several names of Caswell and Hazard had been prominent in the trade of manufacturing and selling drugs and medicines, and other articles connected with such trade, in the cities of Newport, Rhode Island, and New York. The business originally started at Newport as early as 1821, and was there carried on until some time previous to 1867, when a branch was opened in the city of New York. The names of Caswell and Hazard had, subsequent to the year 1821, been continuously used in such trade, either in conjunction or separately, but always in some firm regularly succeeding a prior firm. It is of but little importance what position either of these parties bore to such business previous to 1867, as in that year all their rights were merged in a new firm then organized. In that year the name of "Caswell, Hazard, & Co." was first used, and that firm regularly succeeded to all of the rights, interests, and reputation which those names, or either of them, had previously acquired in the public estimation, both in the cities of Newport and New York. This firm consisted of Philip Caswell, Jr., Rowland N. Hazard, the defendant, and John R. Caswell, one of the plaintiffs herein. Philip Caswell, Jr., owned fourteen thirtieths, Rowland N. Hazard nine thirtieths, and John R. Caswell seven thirtieths of the firm assets. Philip Caswell, Jr., retired from this firm in 1872, transferring, with the consent of John R. Caswell, all his interest and good-will in such firm to Rowland N. Hazard, and covenanting that he would not, within twenty years, go into

the business of druggist or apothecary in either of the cities of Newport or New York. He also took a covenant from Hazard indemnifying and protecting him from all loss or liability from existing debts, or the future liabilities of the succeeding firm. This purchase gave Hazard a largely preponderating interest in the assets of the firm. A new firm was then formed, composed of Rowland N. Hazard, John R. Caswell, and John C. Hazard, to continue the business of Caswell, Hazard, & Co. at the former places of business of that firm. In the new firm, Rowland N. Hazard retained an interest of sixteen thirtieths, John R. Caswell seven thirtieths, and John C. Hazard acquired an interest of seven thirtieths. The new firm took the necessary proceedings and published the advertisements required to entitle them to continue business under the firm name of "Caswell, Hazard, & Co.," according to the provisions of chapter 400 of the laws of 1854. This firm continued business until July 31, 1876, when it was dissolved by mutual consent, and John R. Caswell sold and transferred to its remaining members his interest in the property of the firm, except its trade-marks and a part of the retail stock in trade, which was proportionately divided between the partners. Among the articles thus transferred was the real estate at Newport, in which the business of the firm had theretofore been carried on at that place, the fixtures in the various stores occupied by them in New York, and all signs, labels, bottles, and bottle-molds theretofore used in the business. These goods had the firm name of "Caswell, Hazard, & Co." either painted or printed upon them or blown into the bottles thus transferred. The defendants also assumed the unexpired leases of the various places of business in New York, where the business had been previously conducted, and agreed to collect and settle the outstanding accounts and debts of the old firm, and purchased of Caswell the prescription-books theretofore used in the firm, and became the legitimate successors to such firm. The plaintiffs, for several years after the sale, bought goods, received payments from and did business with the new firm of Caswell, Hazard, & Co. under that name. The defendants, upon the retirement of John R. Caswell, and the formation of this new firm, took the necessary steps to enable them to continue business under the firm name of "Caswell, Hazard, & Co.," as the successors of the former firm of that name, according to the provisions of chapter 400 of the laws of 1854, and from that time until 1886 continued

and carried on their business at all the former places of business occupied by Caswell, Hazard, & Co. without interruption or disturbance from any one. John R. Caswell afterwards formed a partnership with one Massey, under the firm name of Caswell and Massey, and in November, 1876, opened a drug-store in New York, near one of the defendant's stores, and continued thereafter to prosecute such business under such firm name, or others similar thereto. At the expiration of nearly ten years from his withdrawal from the firm of Caswell, Hazard, & Co., John R. Caswell, in behalf of his firm, began this suit, claiming the exclusive right to use the name of "Caswell" in connection with the conduct of the business of manufacturing and selling drugs, etc., in the city of New York and elsewhere, and asking that the defendants be perpetually enjoined from using such name in any way in the prosecution of such business. The court, at special term, gave judgment awarding the plaintiffs an injunction to the full extent claimed against the defendants; and this judgment, on appeal to the general term, was reversed, both upon questions of law and of fact, and a new trial was ordered. The plaintiffs appealed from such order to this court, upon a stipulation for judgment absolute in case such order should be affirmed.

On such an appeal, if the record presents any error, either of law or of fact, made by the trial court which called for a reversal of its judgment, the order of the general term must necessarily be affirmed by this court. The extreme danger which parties having a cause of action, and having recovered a judgment therefor, incur by appealing from an order granting a new trial to this court has been too frequently pointed out in its decisions to need further remark, and it would seem that no amount of admonition is sufficient to discourage parties from taking such appeals: *Cobb v. Hatfield*, 46 N. Y. 533.

A single consideration, pointed out in the opinion of the court at general term, serves to show that the reversal in this case was properly ordered, if for no other reason than because the judgment rendered by the trial court absolutely prohibited the defendants from making any use of the signs, labels, bottles, and bottle-molds bearing the name of "Caswell, Hazard, & Co." sold to them by John R. Caswell. This property was sold expressly for use in the business intended to be carried on by the defendants, and obviously exceeded any legal claim which the plaintiffs could lawfully maintain.

The claim made by the plaintiffs in this action is sought to

be sustained under an alleged right existing in favor of John R. Caswell to the exclusive use of the trade-marks, including the use of the name of Caswell, formerly employed by the firm of "Caswell, Hazard, & Co." in their business.

In discussing the case, it is therefore necessary to refer only to the rights secured by John R. Caswell and Rowland N. Hazard, respectively, as members of the firm of Caswell, Hazard, & Co., as it is through such interests that both the plaintiffs and defendants now claim to derive their respective rights.

Much stress was laid on the argument by the defendants upon the rights acquired by Rowland N. Hazard through the purchase made in 1872 from Philip Caswell, Jr., of his interest and good-will in the firm of Caswell, Hazard, & Co. We do not think a consideration of the effect of that purchase is very important in this case, as it cannot be claimed that Hazard thereby acquired any right in the assets or good-will of such firm, which then or afterwards belonged to John R. Caswell. He could have acquired an exclusive right to the use of such property only by virtue of a transfer to him by all of the parties interested therein, and so long as an outstanding right in such property existed in favor of any one, he could not maintain an exclusive claim thereto.

It also seems unnecessary to consider the prior rights, interests, and reputation of the individual members of such firms, as upon the organization of that firm they became merged therein, and by its continued use and enjoyment became its property, and upon dissolution, belonged in common to its respective members, according to their respective interests in such firm. The trial court found that the firm of Caswell, Hazard, & Co., during its existence from 1871 to 1876, transacted a very extensive business in New York City and Newport and throughout the United States, and also in Europe, as chemists, apothecaries, druggists, manufacturers of and dealers, both at wholesale and retail, in drugs and medicines, and as owners, proprietors, and manufacturers of many proprietary medicinary remedies, toilet articles, preparations, and compounds. This finding seems to be entirely in accordance with the proof in the case, and is of controlling force in the determination of the rights of the respective partners in the trade-marks and assets of that firm.

These facts seem to present two questions for determination in the case: 1. Whether John R. Caswell, upon retiring from

the firm of Caswell, Hazard, & Co. in 1876, succeeded to the exclusive right of using the name of "Caswell" as a firm name in connection with the prosecution of the business of thereafter manufacturing and selling drugs, medicines, etc., in the cities of New York and Newport; 2. Whether he then succeeded to the exclusive right of using the name of "Caswell," either alone or in connection with others, as a trade-mark in carrying on such business.

It is essential that the plaintiffs should successfully maintain the affirmative of both of these propositions in order to sustain this appeal; for if the defendants had any right to use the name of "Caswell," either as a firm name or as a trade-mark, it is obvious that the judgment rendered by the trial court was erroneous to a certain extent, and was properly reversed by the general term. It seems to us quite clear that the plaintiffs have failed to maintain either of these claims. The right which every person has to use his own name in the prosecution of his business cannot be disputed, and this right can be limited or controlled only when such name has become the trade-mark or business sign of another, and is being used to deceive the public or defraud the person who made it valuable: *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173; *Meneely v. Meneely*, 62 N. Y. 432; 20 Am. Rep. 489. Conceding, therefore, the right of John R. Caswell to use his own name and the trade-marks of the firm of Caswell, Hazard, & Co. in his business, it falls far short of securing to him the right to the exclusive use of the name of Caswell, which had been largely made valuable in trade by the capital, skill, and enterprise of others. From 1867 to 1872 that name in the firm of Caswell, Hazard, & Co. mainly represented Philip Caswell, Jr., and the defendant Rowland N. Hazard succeeded by assignment to all his rights in that firm. There is, therefore, no foundation for the claim of John R. Caswell that he succeeded in any respect to the rights or reputation which Philip Caswell, Jr., acquired in the business of Caswell, Hazard, & Co. Rowland N. Hazard, by his purchase, acquired all such rights as could lawfully be enjoyed by any purchaser, and in addition thereto, possessed the rights belonging to himself as a member of the various firms doing business under the firm name of "Caswell, Hazard, & Co." The right of Rowland N. Hazard to use the trade-marks and signs of Caswell, Hazard, & Co. seems to rest as securely upon those which he acquired as a member of such firms, as upon the rights transferred

to him by the several members of such firm. The right to a trade-mark is derived from its appropriation and continual user, and becomes the property of those who first employed it and gave it a name and reputation: *Devlin v. Devlin*, 69 N. Y. 212; 25 Am. Rep. 173; *Colman v. Crump*, 70 N. Y. 578. It becomes part of the assets of the firm by which it was used and established, and can be owned, transferred, and sold like other species of property. Upon the dissolution of a firm which has acquired its proprietorship, it must be sold, and its proceeds distributed like other firm assets, and if not so disposed of, it remains the property of the individual members of the dissolved firm, and may lawfully thereafter be used by any or either of such members desiring to continue the prosecution of the business in which it has theretofore been used: *Huwer v. Dannenhoffer*, 82 N. Y. 500; *Hazard v. Caswell*, 93 N. Y. 259; 45 Am. Rep. 198.

Assuming, therefore, the correctness of the plaintiff's claim, that upon the dissolution of the firm of Caswell, Hazard, & Co., in 1876, there was no transfer by either party to the other of the right to use its trade-marks and firm name, yet the right thereafter to use its trade-marks then became vested in the individual members of such firm, and could be lawfully employed by either without trespassing upon the rights of the other. This proposition, as we have seen, was expressly held in the case of *Hazard v. Caswell*, 93 N. Y. 259, 45 Am. Rep. 198, between these same parties. That case depended substantially upon the state of facts existing in this case, and the present defendants then claimed the right to restrain the plaintiffs from using either the name of "Caswell" or the trade-marks formerly used by the firm of Caswell, Hazard, & Co. in manufacturing and putting up a certain description of cologne. They claimed a right to the exclusive use of such name and trade-mark by reason of the various transfers of property made to them by Philip and John R. Caswell, and sought to restrain Caswell from the use of his own name. It was held that neither party secured an exclusive right to the use of such trade-marks by reason of such transfers, and that upon the dissolution, in 1876, of the firm of Caswell, Hazard, & Co., in the absence of any disposition of such property, either of the members of such firm had the right to make use of them in his separate business. That decision seems to be conclusive as to the main question here involved, and renders the question of the right to use the name

of "Caswell" as a trade-mark in connection with the business of manufacturing and selling drugs and medicines by either of the former partners *res judicatæ* as between such parties: *Huwer v. Dannenhoffer*, 82 N. Y. 500.

Even if this were not so, it seems difficult to resist the conclusion that John R. Caswell, by the sale and transfer to Caswell, Hazard, & Co., in 1876, of the property of the old firm bearing the name of "Caswell, Hazard, & Co." indelibly printed or impressed thereon for use in their business, knew and intended that such property at least should be thereafter used and sold by the vendees in their business as successors to the former firm. The fact that it could be so used was the only apparent inducement for its purchase by the defendants, and this must have been known and understood by John R. Caswell, and he could not thereafter claim that so far as that property was concerned, it was used without his permission.

We are also of the opinion that the present defendants have, as the legitimate successors to the former firms of "Caswell, Hazard, & Co.," lawfully acquired the right to use that name as a firm name. At common law it was undoubtedly the right of such members of a dissolved firm, having acquired an established reputation for the character and quality of the goods manufactured and sold by them, who desired to continue such business, to continue the former firm name and transact business thereunder, although none of such parties bore the names contained in the original firm: *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De Gex, J. & S. 143; 11 H. L. Cas. 534.

Under the provisions of chapter 281 of the laws of 1833, however, such right is now attainable in this state only by a compliance with the requirements of chapter 400 of the laws of 1854. These acts do not assume to confer upon the members of a continuing firm any rights of property possessed by the members of the dissolved firm; but they do provide that, under certain conditions, and upon taking certain proceedings, the members of a succeeding firm may continue business under the former firm name, although no person in such succeeding firm bears the name of any of the retiring members of the original firm.

Upon the retirement of Philip Caswell from the firm of Caswell, Hazard, & Co., in 1872, as well as upon the withdrawal of John R. Caswell, in 1876, the defendants or their

predecessors took all of the necessary proceedings required under the statute of 1854 to entitle them to continue business under the firm name Caswell, Hazard, & Co., and they have continued such business, by virtue of such proceedings, under that firm name, without interruption or molestation, from 1872 to 1886, and we can see no reason why they did not thereby become lawfully entitled to use such name.

The publication of notices in 1872 could have had no other object than to invest Rowland N. Hazard with the right to the continued use of such firm name. There was no necessity for the firm formed in 1872 to resort to those proceedings to authorize them to use the name of "Caswell" in their firm name, because it was then represented by one of the partners, and the only object of such proceedings seems to have been to perpetuate the name and reputation which the former firm had acquired for the benefit of the several members of the new firm. A similar object would seem to have instigated the subsequent publication in 1876, and the right to make such publication does not, under the statute, seem in any respect to depend upon the knowledge or assent thereto of the retiring members. The statute appears to confer the absolute right to perpetuate the firm name upon the persons succeeding to the business of a dissolved firm, provided they have business relations with foreign countries, and desire to continue such business.

A possible question might arise as to the liability of a retiring member for the subsequent transactions of the succeeding firm; but there has been no such claim raised in this case, and after the lapse of ten years it would seem to be quite too late to present it, if it ever existed. It is not now claimed that any such question is involved, but the action is sought to be supported upon the sole ground that no person bearing the name of Caswell is now represented in such firm. The objection to the use of the name "Caswell" is founded wholly upon the prohibitions contained in the act of 1833, and takes no account of the exception to such prohibition introduced by the act of 1854. Some difficulty in administering this act might arise in a case where there were conflicting claims between the several members of a dissolved firm as to the right to continue the use of the old firm name, but no such question arises here, as John R. Caswell was in no sense the successor of such firm, and never attempted to use their name or continue their business. He not only abandoned all claim to

continue the use of the old firm name, or succession to its good-will so far as it was affected by the places of doing such business, but by his subsequent dealings with the defendants seemed to acquiesce in their appropriation of such name.

Some foundation for the plaintiffs' claim is supposed to have been found in expressions used in the opinion of this court in the former case of *Hazard v. Caswell*, 93 N. Y. 259; 45 Am. Rep. 198. It is sufficient to say that the question was not there involved, and could not have been decided. The sole question then presented was, whether Rowland N. Hazard acquired the exclusive right to use the name of "Caswell," in connection with others, as a trade-mark in the manufacture and sale of a certain description of cologne; and it was held that he had not, and that the right to such use rested equally in both Caswell and Hazard, as members of such firm.

We are, for reasons stated, of the opinion that the plaintiffs failed to establish the causes of action set forth in their complaint, and that the order of the general term should therefore be affirmed, and judgment absolute ordered for defendants, with costs in all courts.

TRADE-MARKS—NAMES. — Generally, one, by using his own name as a trade-mark, cannot deprive another having the same name from using it in conducting his business, provided the latter resorts to no device or artifice to create the impression that the goods manufactured or sold by him are manufactured or sold by the former: *Frazer v. Frazer L. Co.*, 121 Ill. 147; 2 Am. St. Rep. 73, and note. The assignment of trade-marks of which the assignor's name is a part is the subject of a note in 17 Am. St. Rep. 496-499.

TRADE-MARK, DISPOSITION OF, UPON THE DISSOLUTION OF A PARTNERSHIP: See *Bowman v. Floyd*, 3 Allen, 76; 80 Am. Dec. 55, and note.

PEOPLE v. NORTH RIVER SUGAR REFINING Co.

[121 NEW YORK, 582.]

CORPORATION. — TO ENTITLE THE STATE TO A FORFEITURE OF THE CHARTER OF A CORPORATION, it must show, on the part of such corporation, some sin against the law of its being which produces, or tends to produce, injury to the public. The transgression must be material and serious, and such as to harm or menace the public welfare; for the state does not concern itself with the quarrels of private litigants.

CORPORATION — FORMATION OF TRUST, WHEN SUFFICIENT TO FORFEIT CHARTER. — If a corporation becomes an integral part of a combination which possesses over it absolute control, which has absorbed most of its corporate functions, and dictates the extent, manner, and terms of its entire business activity; if that combination draws unto its control other corporations in the same business; if all the stock is transferred to a cen-

tral board, and in exchange for it certificates are taken and distributed to its own stockholders, carrying a proportionate interest in what it describes as its capital stock, new directors being chosen by the board, who are made eligible by the gift to them of single shares, and liable to be removed under the terms of their appointment at any moment of independent action; if it loses its power to make a dividend, and is compelled to pay over its net earnings to a master whose servant it has become, and ceases to carry on business under orders of that master, cannot stir without his approval, and yet is entitled to receive from the earnings of the other corporations its proportionate share of all profits, for division among its own stockholders, who hold substituted certificates, and is liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other coveted corporations and their business, — then such corporation has been guilty of an excess and abuse of its power which threatens and harms the public welfare, and justifies a judgment dissolving the corporation.

CORPORATE CONDUCT MAY TAKE PLACE WITHOUT THE TRUSTEES OR DIRECTORS FORMALLY ACTING AS SUCH; and where that conduct is directed and produced by the whole body, both of officers and stockholders, it is of a corporate character, and if illegal and injurious, may deserve and receive the penalty of dissolution.

CORPORATION — FORFEITURE OF FRANCHISE FOR INACTION. — If a corporation holds its franchise in silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the state can put its finger and say, This the corporation has done by the agency through which it is authorized to act, — such inaction is corporate conduct which the state may question and punish without searching for a formal corporate act.

CORPORATE CONDUCT, WHAT IS. — If the directors of a corporation see its stockholders pervert its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, and silently acquiesce, as directors, in the wrong which as stockholders they have themselves helped to commit, this is corporate conduct, though there be an utter absence of directors' resolutions.

CORPORATE ACTION, WHAT IS. — When the stockholders of a corporation all act collectively and as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character and affecting the vitality, independence, and utility of the corporation itself, the court cannot hesitate to conclude that there has been conduct which the state can review and punish by declaring a forfeiture of the corporate franchises and charter.

CORPORATIONS, PARTNERSHIP BETWEEN. — For corporations to enter into partnership is a violation of the law.

ACTION by the attorney-general to have the defendant dissolved, its charter vacated, and its corporate existence annulled. The trial court gave judgment dissolving the corporation and annulling its charter, and this judgment was affirmed on appeal to the general term. The defendant, being a corporation organized under the general manufacturing act, entered, with other corporations and firms, into, and became a party to and

carried out, an agreement, which is in the words and figures following:—

"DEED

"THE SUGAR REFINERIES COMPANY.

"The undersigned, namely, Havemeyers and Elder, the Decastro and Donner Sugar Refining Company, F. O. Matthiesen and Weichers Sugar Refining Company, Havemeyer Sugar Refining Company, Brooklyn Sugar Refining Company, the firm of Dick and Meyer, the firm of Moller, Sierck, & Co., North River Sugar Refining Company, the firm of Oxnard Brothers, the Standard Sugar Refinery, the Bay State Sugar Refinery, the Boston Sugar Refining Company, the Continental Sugar Refinery, and the Revere Sugar Refinery, for the purpose of forming the board hereinafter provided for, and for the other purposes hereinafter set forth, enter into the following agreement:—

"NAME.

"The board herein provided for shall be designated by the name of the Sugar Refineries Company.

"OBJECTS.

"The objects of this agreement are,—

"1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit.

"2. To give to each refinery the benefit of all appliances and processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.

"3. To furnish protection against unlawful combinations of labor.

"4. To protect against inducements to lower the standard of refined sugars.

"5. Generally, to promote the interests of the parties hereto in all lawful and suitable ways.

"BOARD.

"The parties hereto who are not corporations shall become such before this deed takes effect.

"Each corporation subscribing hereto agrees, and the parties hereto who are not corporations agree as to the corporations which they are to form, that all the shares of the capital stock of all such corporations shall be transferred to a board, consisting of eleven persons, which may be increased to thir-

teen by vote of a majority of the members of the entire board, and two additional members to belong respectively to the first and second classes hereinafter provided for.

"Any member of the board may be removed by vote of two thirds of the members of the entire board in case of incapacity or neglect or refusal to serve.

"Any member may resign by filing written notice of his resignation with the secretary of said board.

"Vacancies during the term of office of members shall be filled by appointment by vote of the majority of the members of the entire board.

"A member appointed to fill a vacancy shall hold office until the expiration of the term of the member in whose place he is appointed, which new appointee shall succeed to all the rights, duties, and obligations of his predecessor under this deed.

"Vacancies by expiration of office shall be filled at the annual meeting of the holders of certificates herein provided for, or at such other times as shall be prescribed by the board.

"Such annual meetings shall be held in the city of New York, in the month of June, and notice shall be given to each certificate-holder of record of every meeting of certificate-holders, by mailing to him, at least seven days before said meeting, a notice of the time, place, and objects of such meeting. Holders of certificates shall vote according to the number of shares for which they hold certificates. They may vote by proxy.

"The board may make by-laws. All arrangements for meetings, elections, and all details not herein specifically provided for shall be made by the board. A member of the board may act by proxy for any other member with like effect as if he were present and acting.

"A majority of the members of the board shall constitute a quorum for the transaction of business. The action of the board meeting, by a majority vote of such meeting, shall have the same effect as the unanimous action of the board, except as herein otherwise provided, and that to authorize the appropriation of money, bonds, or shares shall require the assent, either written or expressed, by vote at a board meeting, of at least a majority of the members of the entire board.

"No member of the board shall, during the time that he holds office, buy or sell sugar, or be interested directly or indirectly in the purchase or sale of sugar, whether for the purpose of speculation or otherwise, without a vote of a majority of the

members of the entire board. For any violation of this provision he may be removed as a member of the board, and shall be liable to account for all profits which shall be realized by him to the board for the *pro rata* benefit of the certificate-holders.

"As it is desirable that the board shall consist of members who are largely interested in the properties and the business contemplated, it is hereby agreed that all members of the board shall be free to join in or become parties to agreements and transactions which the several boards of directors hereinafter referred to, or this board, may arrange, to the same extent and in the same manner and with the like effect as if they were not members of the board.

"This board may transfer, from time to time, to such persons as it may be desired to constitute trustees or directors, or other officers of corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board in behalf of and as attorneys for the board for that purpose, and to be retransferred when so requested by the board.

"The first board shall consist of the persons hereinafter mentioned; they shall hold office as follows, and until their successors shall be elected:—

"*Members of the first class:* Harry O. Havemeyer, F. O. Matthiessen, John E. Searles, Jr., Julius A. Stursberg; to hold office seven years.

"*Members of the second class:* Theodore A. Havemeyer, Joseph B. Thomas, John Jurgensen, Hector C. Havemeyer; to hold office five years.

"*Members of the third class:* Charles H. Senff, William Dick; to hold office three years.

"At the expiration of the terms of the third class, and of each successive class, their successors as members of such class shall be elected for seven years.

"OFFICERS

"The board shall appoint from its members a president, vice-president, and treasurer, and it shall also appoint a secretary, who may or may not be a member of the board. The board may, from time to time, create other offices, and appoint the persons to fill them. It may appoint committees. It shall designate the duties and prescribe the powers of the several officers and committees.

terms of the deed referred to in the certificates as the same shall be changed from time to time.

"Witness my hand and seal this day of
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"TITLE.

"The shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants.

“By the death, resignation, or removal of any member of the board, the whole title shall remain in the others. All members ceasing to be such shall execute such instrument as may be necessary, if any, to keep the title vested in the persons who from time to time shall be members of the board.

"The board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations, and subject only to the purposes set forth in this deed.

"DIVISION OF INTEREST.

“The several corporations shall be entitled to the shares in the following proportions of the fifty million dollars, viz.:—

"Havemeyers and Elder.

"Decastro and Donner Sugar Refining Company.

**"F. O. Matthiessen and Weichers Sugar Refining Com-
pany.**

"The Havemeyer Sugar Refining Company.

"The Brooklyn Sugar Refining Company.

"Dick and Meyer.

"Moller, Sierck, & Co.

"Oxnard Brothers.

"North River Sugar Refining Company."

"Standard Sugar Refinery.

"Boston Sugar Refining Company.

" Bay State Sugar Refinery.

"Continental Sugar Refinery.

"Revere Sugar Refinery.

"Each refinery and the corporation to which it belongs shall be freed from liability and indebtedness by the parties interested in it; or such parties, if the board shall approve, may provide in cash for such indebtedness or liability, leaving the same to stand at the pleasure of the board, except that the employees' contracts shown in the schedules hereto

annexed, and the contracts with Havemeyers and Elder and the F. O. Matthiessen and Weichers Sugar Refining Company, and the Bay State Sugar Refinery, pending for improvements and enlargements, shall continue as liabilities.

"Annexed hereto are schedules, in general terms, of the properties of the several refineries. The properties are guaranteed to correspond with the schedule by the parties interested therein, who are to make good any deficiency. On the complete execution of this agreement, each of the said parties shall make a full inventory of the property not embraced in such schedules, and useful for the conduct of the business, on hand or contracted for, including raw and refined sugars, molasses, sugars in process, syrups, bone-black, fuel, barrels, packages, charcoal, and other supplies; and such inventory is to be examined, and the articles appraised at their present cash value (except as to sugar and molasses to arrive, which are to be appraised at their market value on arrival), by a committee of five persons, as follows:—

"Theodore A. Havemeyer.

"F. O. Matthiessen.

"Julius A. Stursberg.

"John E. Searles, Jr.

"Joseph B. Thomas.

"The value of such property as fixed by four fifths of the appraisers shall be paid for in cash by the said board to the treasurer of each corporation.

"Bone-black may, at the option of the board, be paid for in cash, or in bonds hereinafter provided for, or in certificates, at a rate for bonds or certificates to be fixed by vote of a majority of the members of the entire board.

"The property shall remain with the refinery where it is to be used by it, except as such refinery shall make a different disposition of it.

"In consideration of the transfer of their stock to the board, the board shall also pay to Havemeyers and Elder the sum of
to the F. O. Matthiessen and Weichers
Sugar Refining Company the sum of
and to the Bay State Sugar Refining Company the sum of
on account of payments already made
on pending contracts for improvements and enlargements.

"Additional shares to the amount of four hundred thousand dollars, less fifteen per cent to be left with the board as hereinafter provided, shall be received by Moller, Sierck, & Co. for

improvements and enlargement of capacity of their refinery now in progress, when said improvements are completed and the increased capacity demonstrated.

"The shares assigned to the several refineries shall be distributed by them to and among the parties interested therein.

"Each holder of stock in a refinery company shall be entitled to so many of the shares allotted to such refinery as shall be in proportion of his stock to the capital of his company.

"Shares for stockholders of any refining company who shall not surrender their stock may, under the direction of the board, be deposited for their account, with the right to receive the same upon the surrender of their stock.

"Of the shares allotted to the several refineries, they shall leave fifteen per cent with the board, and these shares, and any shares not allotted of the fifty million dollars, except as herein otherwise provided, shall be subject to be disposed of by the board, either for the acquisition of other refineries to become parties to this deed, payment for additional capacity, or by appropriations to the several refineries.

"But in no case shall any appropriation be made to or any action taken by any corporation without the approval of its board of directors, and no action be taken by the board which shall create liability by it or by its members.

" PROFITS.

"The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock, as hereinbefore provided.

" FISCAL ARRANGEMENTS.

"The funds necessary to enable the said board to make the payments herein provided to be made by it may be raised by mortgage to be made by the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

"In case any mortgage shall be laid on the property of any corporation by its directors or stockholders, the holders of certificates shall, within a time to be fixed by said board, have

the right, at such uniform rates as said board shall arrange, to have the bonds, certificates, or other evidence of debt or interest in proportion to their respective holdings. Any parts which shall not be thus taken may be disposed of by said board.

"CHANGES.

"The number of shares and the total amount thereof issuable by said board may from time to time be increased or diminished by deeds executed by a majority in value of the certificate-holders.

"The provisions of this deed may from time to time be changed by deed executed by not less than a majority in interest of the certificate-holders, provided no change shall be made which shall discriminate to the disadvantage of the certificate-holders as between themselves.

"ACQUISITION OF OTHER REFINERIES.

"The capital stock of other sugar refining companies, and of companies whose business relates directly or indirectly to sugar refining (in every instance to be incorporated), may be transferred to said board with the consent of a majority thereof, at valuation, and upon terms satisfactory to it, to be held by said board under and subject to all the terms of this deed, and certificates may be issued therefor by said board, and may be sold by it to provide funds for such purchase or purchases, and any such corporation or corporations shall thereupon become a party to this deed upon causing the same to be duly signed in its behalf.

"CUSTODY OF DEED.

"This deed, when executed by the parties hereto, shall be delivered to the president of the board, who shall have the sole and independent custody and control of the same, and the said deed shall not be shown or delivered to any corporation, firm, person, or persons whatsoever, except by the express direction and order of the board.

"A copy of the said deed shall also be lodged with a member of the board residing in Boston, Massachusetts, which shall be held by him under the same condition and in the same manner as the original deed.

"In witness whereof, the parties have hereto set their seals and affixed their names, these presents to become binding

when completely executed by all the parties, and to take effect from October 1, 1887.

"Dated August 16, 1887.

"HAVEMEYERS AND ELDER.

"DONNER AND DE CASTRO SUGAR REFG. Co.,
Per H. O. HAVEMEYER, Manager. (Subject
to confirmation stock and scrip holders.)

"F. O. MATTHIESSEN AND WEICHERS SUGAR REFG. Co.,
F. O. MATTHIESSEN, P.

"HAVEMEYER SUGAR REFINING COMPANY,
JOHN E. SEARLES, Jr., Treas.

"DICK AND MEYER.

"NORTH RIVER SUGAR REFINING Co.,
GEO. H. MOLLER, Secretary.

"OXNARD BROS.

"MOLLER, SIERCK, & Co.

"BROOKLYN SUGAR REFINING Co.,
HENRY OFFERMAN, Treas.

"STANDARD SUGAR REFINING Co.,
By CHARLES O. FOSTER, Pres.

"BAY STATE SUGAR REFG. Co.,
Per EDWIN F. ATKINS, Pres.

"CONTINENTAL SUGAR REFINERY,
By SILAS PIREE, Pres.

"The undersigned hereby agree to become parties to the foregoing deed in accordance with the terms and condition therein stated, they to receive without discount the amounts in certificates set opposite their respective signatures.

"FOREST CITY SUGAR REFINING Co.,
By H. J. LIBBY, President.
GEO. S. HUNT, Treas.

"ST. LOUIS SUGAR REFINING Co.,
By W. L. NOOTT, President.
A. D. CUNNINGHAM, Sect. and Treasurer.

"PLANTERS' SUGAR REFINING Co., New Orleans,
JOHN BARKLEY, Prest.

"LOUISIANA SUGAR REFINING Co.,
JOHN S. WALLIS, President."

The defendant signed this instrument by George H. Moller, its secretary, in September, 1887, who acted "by virtue of authority from the stockholders of the board of officers of the

854 **PEOPLE v. NORTH R. SUGAR REFINING CO.** [New York, North River Sugar Refining Company, the stockholders and trustees.]

The following records of defendant's board of trustees were given in evidence:—

"A meeting of the stockholders of the North River Sugar Refining Company, held at the office of the refiners, corner of Water and Corlears streets, April 22, 1887.

"Present: Peter Moller, Jr., Cord Moller, George H. Moller, Jr., John Moller, Gerd. Martens, Marx Wintjen, Charles Sherman, executor for B. B. Sherman's estate; George H. Moller, Gerh'd G. Moller.

"Peter Moller, Jr., in the chair.

"The reading of the minutes in January were dispensed with.

"Mr. George H. Moller offered the following preamble and resolution:—

"Whereas, it is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"Whereas, we deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation; therefore, be it

"Resolved, Peter Moller, Jr., George H. Moller, and Gerd. Martens be and they are hereby appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act and to sign all contracts and agreements in the name of the said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.

"Carried by a unanimous vote.

"On motion of George H. Moller, it was further

"Resolved, that we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements, and papers which the above-named committee may make in relation to the said consolidation.

"All present voting in the affirmative.

"GEORGE H. MOLLER, Secretary."

At said meeting all of defendant's trustees were present.

"A meeting of the stockholders of the North River Sugar Refining Company, held November 4, 1887.

"Present: Peter Moller, Jr., Charles Sherman, executor of B. B. Sherman's estate, Marx Wintjen, Gerd. Martens, Cord Moller, George H. Moller, Jr., Charles G. Moller, and George H. Moller.

"Peter Moller, Jr., in the chair.

"The minutes of the meeting held on April 22, 1887, were read and approved.

"The following preamble and resolution were offered by Charles G. Moller:—

"Whereas, at a meeting of the stockholders of the North River Sugar Refining Company, held on the twenty-second day of April, 1887, Peter Moller, Jr., George H. Moller, and Gerd. Martens were appointed a committee to make arrangements to perfect a consolidation with the several sugar refiners of New York and other cities, with power to sign contracts in the name of the said company looking to this end; and

"Whereas, the president and secretary of said company were authorized to sign all contracts and agreements which the said committee might make in relation to said consolidation; and

"Whereas, the said committee has failed to make or sign such contracts, and the powers conferred upon it, and upon the president and secretary, have not been exercised, and it is deemed inexpedient at the present time to enter into any such consolidation as proposed,—

"Resolved, that the powers conferred upon the said committee, and upon the president and secretary, as above stated, be and the same hereby are revoked, and said committee is discharged from further consideration on the subject, and the resolutions of the date above referred to, conferring such powers, hereby canceled and annulled.

"The above resolution was carried unanimously.

"GEORGE H. MOLLER, Secretary."

"A meeting of the stockholders of the North River Sugar Refining Company was held at the office of the company, 92 Wall Street, on the twenty-fifth day of November, 1887. . . .

"The matter in relation to the North River Sugar Refining Company with the Sugar Refiners' Union was considered.

"Whereas, on or about the fifth day of December, 1887, George H. Moller, secretary of the North River Sugar Refining Company, signed a deed of consolidation of the various sugar refining companies in the United States, under the belief that he was authorized so to do, providing for the delivery of the stock of the company to trustees therein named, and for receiving stock of the consolidated company in return, as provided in said instrument; and

"Whereas, John E. Searles, Jr., has offered to purchase the capital stock of said North River Sugar Refining Company for the sum of three hundred and twenty-five thousand dollars, this consideration not to include the six lots of land on the southwest corner of Corlears and Water streets, for which twenty-five thousand dollars has been allowed out of the consideration of three hundred and fifty thousand dollars, originally mentioned, the property known as Nos. 11 and 13 Hubert Street, of books and accounts, bills receivable, and all other personal property (not belonging to the refinery) of the North River Sugar Refining Company, and the lease of the stables, and the lease of the office No. 92 Wall Street, except office furniture and safes at the refinery, —

"Resolved, that Peter Moller, Jr., George H. Moller, and Gerd. Mertens be and they are appointed a committee to deliver the said stock to John E. Searles, Jr., or at his request, to John E. Parsons, John R. Dos Passos, and Franklin Bartlett, trustees, on receipt of the sum of three hundred and twenty-five thousand dollars, the proceeds to be divided among the stockholders of this date according to their respective shares.

"Carried unanimously."

Defendant's capital stock was all transferred to Mr. Searles, each certificate being indorsed in blank. The sum specified, three hundred and twenty-five thousand dollars, was paid, and the proceeds divided among the stockholders. The works of the defendant were running when the transfer was made, and continued to do so up to January 1, 1888, for the purpose of working up stock in hand. They were then closed, and turned over to Mr. Searles, who permitted them ever thereafter to be idle. He was a member and secretary and treasurer of the board created by the deed. All of the stock not held by the new board of directors was transferred to that board, which issued certificates to the amount of five hundred and ninety-five thousand dollars, that is, seven hundred thousand dollars, less fifteen per cent reserved under the provisions of the deed. A dividend of two and a half per cent was declared by the board in April, 1888, of which the holders of the certificates issued in exchange for defendant's stock received their proportion.

James C. Carter and John E. Parsons, for the appellant.

Roger A. Prior and Attorney-General Charles F. Tabor, for the respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The state, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter, but is beyond dispute where the state summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two of the charges preferred in the complaint have dropped out of sight. They were of little importance, and have been prudently dismissed from the inquiry for that reason; and we are left to consider the one grave and serious accusation to which alone the proofs and argument have been directed. That accusation is adequate, to the purpose for which it was framed, but upon two conditions, which dictate the line of inquiry and limit the area of discussion. It appears to be settled that the state as prosecutor must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare. For the state does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But where the transgression has a wider scope, and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty. The Code of Civil Procedure authorizes an action for that purpose when the corporation has "violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the

abuse of its powers." In *Thompson v. People*, 23 Wend. 583, the ground of forfeiture was tersely described as "some misdemeanor in the trust injurious to the public", and as recently as the case of *Leslie v. Lorillard*, 110 N. Y. 531, we said: "In the granting of charters the legislature is presumed to have had in view the public interest; and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public."

Two questions, therefore, open before us: 1. Has the defendant corporation exceeded or abused its powers? and 2. Does that excess or abuse threaten or harm the public welfare?

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process; for as an unquestionable truth we find it there. All its stock has been transferred to the central association of eleven individuals denominated a "board"; in exchange, it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much, has lessened the supply upon the market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for

other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination, and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement, and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault, or its misfortune; by a sale, or by a trust. For if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way, as any absolute owners may,—if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

On the other hand, it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made

between them, we have gone a long distance towards the end of the controversy.

In making that choice, we must necessarily analyze and construe the deed or contract which formed the terms of the combination, and which not only dictated its character, but brought it into existence. That contract, on the theory of a sale, is an unexpected and unaccountable document. A sale presumes vendors on the one side and vendees on the other, each having life and existence, and the power and ability to contract. Here there was no joint-stock association existing or organized until the vendors themselves created it, and they were obliged to construct their vendee in the very act of transfer. A contract of sale implies some negotiation between buyer and seller, each consulting his own interest, and acting independently and of his free choice. Here there was no negotiation with the board, but the vendors, having created their vendee, themselves alone dictated the terms on which they should sell and it should buy. The selling stockholder explicitly swears that the board had nothing whatever to do with fixing the price. In a contract of sale covering property valued at some fifty millions of dollars and containing a patient statement of the terms of the trade, we should naturally expect that at least the buyer would give it his signature, and bind himself to the purchase. This contract of sale is not signed by the vendees at all, and their assent is left to be supplied by inference from their action. In an ordinary sale, the vendee becomes owner, and has the rights of an owner, and may do what he pleases with his own; but this contract tells the owners what they shall do with the property bought, and how they shall hold it, and inferentially, at least, forbids its further sale or transfer. As a general rule, the vendor fixes the value or price of the property which he sells, or sometimes submits the question to disinterested appraisers; but this contract of sale generously allows the value of the personal property, separate from the plant, to be appraised and fixed by five persons, all of whom are themselves among the purchasers.

These are general considerations which make one hesitate over the theory of a sale as distinguished from a trust; but the doubt increases as we come closer to the details of the agreement, and scrutinize its exact terms.

It is observable that the selected transferee of the stock of the corporations was denominated simply a "board." That

implied agency, a committee of managers, official servants charged with executive duties and acting for and in the interest of others. The idea of a joint-stock association capable of buying and acting as purchaser had not yet dawned. Explicitly the deed declares "the shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants." If, beyond the inference of agency suggested by the name and description of the board, more was needed to indicate the real aim and intention, it is supplied by the frank declaration that the transferees shall take as trustees, and hold in joint tenancy, which is the characteristic manner of a trust.

Other clauses in the instrument point significantly to the same construction. The purchase of stock in a corporation makes the buyer a stockholder. No such purchaser would think for a moment of requiring from the corporation a stipulation that he should have the rights of a stockholder, for those rights attach at once by force of his ownership. Yet we find in the document under examination, following the provision which requires the board to take as trustees, a clause entirely superfluous if a sale was meant, but a reasonable stipulation if a trust was intended, that "the board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations." The clause carries with it a distinct suggestion that no absolute sale was intended, but a transfer in trust which might leave the assignors who became the beneficiaries some equitable right over the voting power; and to make sure of the vesting of that right in the trustees, a specific and broad covenant was adopted adequate for all emergencies.

The owners of corporate stock, by force of their ownership, may put a mortgage upon the corporate property when the statute permits. Nobody doubts that, and no buyer would demand that permission of the seller. But the contract in question explicitly authorizes the board to raise money by mortgages upon the property of the corporations. It strikes one as odd to see an absolute purchaser requiring his vendor in the deed of conveyance to covenant that the grantee may be at liberty to encumber by mortgage his own property. The astute pen which framed the deed of association had a very different aim, and realized that trustees, holding for trust

purposes, should have power to mortgage given them if that necessity was contemplated.

A vendor about to sell his property, and to a very large amount, naturally looks carefully to his pay. A merchant or manufacturer who should sell his wares to a corporation having no other capital than the exact property bought, and take his pay in the stock of such corporation, would scarcely be deemed sane in business circles. The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name, and, as we shall see, heavily watered, and with its care and management intrusted to others, under an arrangement which might or might not add to its earning power.

If, in truth, the board was meant to be anything more than a trustee or manager of the combined corporations, if it was contemplated that it should become and be a joint-stock association at all, it was put by the very articles of its creation under the most singular and oppressive restrictions. What shall we say of a joint-stock association without a dollar of actual capital, and yet forbidden to incur the least debt or obligation? It was commanded that "no action be taken by the board which shall create liability by it or by its members." Without a dollar it could not borrow a dollar; without money it could incur no debt; its cash resources were to come from a sale of its own certificates reserved over and above those allotted, or from mortgages made by the separate corporations; and yet this curious creation, viewed as a joint-stock association, was able to induce the sale to it of twenty corporations. The stockholders, with astonishing generosity, sold and transferred to it all their stock, allowed it to pocket fifteen per cent of its agreed value, and took aliquot parts of the remainder of their own property for their pay. It seems to me that the theory of an absolute sale involves us in difficulties and complications on almost every page of the deed or combination agreement, and that it is an after-thought framed under pressure, and mismatching the entire tenor and terms of the instrument which it was invented to sustain. Indeed, I notice among the briefs submitted to our study a reprint of an article from a distinguished pen, which traces the origin and history of economic combinations and monopolies, and

ends with a determined defense of the one under review, but concedes it to be a trust created by contract, and organized and existing as such.

The combination, therefore, framed by the deed was a trust; and if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers, and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter, to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

On the twenty-second day of April, 1887, there was a meeting of defendant's stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote:—

"Whereas, it is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"Whereas, we deem it for the interest of the North River Sugar Refining Company to participate in the above said consolidation; therefore, be it

"Resolved, that Peter Moller, Jr., George H. Moller, and Gerd. Martens be and they are hereby appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Company, with full power to act and to sign all contracts and agreements, in the name of the said North River Sugar Refining Company, of whatever name or nature, concerning the said consolidation.

"Resolved, that we authorize the president and secretary of the North River Sugar Refining Company to sign all contracts, agreements, and papers which the above-named committee may make in relation to the said consolidation."

In September following, the secretary of the corporation added its signature to the deed. He tells us, under oath, "I made that signature by virtue of authority from the stock-

holders and the board of officers of the North River Sugar Refining Company, the stockholders and trustees." It follows that the committee to whom authority was given to make the agreement had made it. The stockholders, by a unanimous vote, decided to go into the proposed combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was, therefore, actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency.

But it said the corporation repented, and withdrew from the agreement. I do not stop to discuss the question whether they could revoke without the consent of the board and their associates in the trust deed; for assuming that they could, I prefer to analyze their revocation, and see the scope and range of their repentance. The corporation remained a contracting creator of the trust until November 4, 1887. By the deed, the trust took effect on October 1st of that year, so that the defendant in its full corporate character became a party to it according to the terms of the deed, and remained bound by it for at least one month. But then there did come either repentance or fear. In November the stockholders again assembled, and passed the resolution which is relied upon as a revocation. Its preamble recites a series of denials that the committee had made any agreement or that the president and secretary had signed any, and then, after declaring "it is deemed inexpedient at the present time to enter into any such consolidation," they revoked the powers conferred and the resolutions conferring them. That is to say, after the powers had been executed and had put the corporation into the combination, and it had become a constituent element of the trust, those powers were revoked upon a false assertion that they remained executory, and so their revocation could be effective.

I say a false assertion, for we are not at liberty to believe that George H. Moller, who was secretary of the corporation and one of the very committee authorized to make the agreement of consolidation, signed the deed when he knew that the committee had not agreed, and so in violation of his duty and without authority, and then positively swore that he signed by authority of the stockholders and trustees. His act and his oath heavily outweigh the resolutions of repentance. Let us not fail to observe that no signature is withdrawn, no notice is served upon the board or the associates, no consent of theirs asked or demanded; but the parties of one part to a contract come together and pass a resolution that they have not contracted, and do not mean to, and rely upon that as releasing them from their obligation. All that they effectively did was to raise a question of veracity, which must be decided against them upon the act and the oath of their own officer.

That repentance proved to be only a prelude to the exact sin claimed to have been avoided. On the 25th of November, 1887, which was just three weeks after the resolutions of revocation, the stockholders of the defendant company formally resolved to sell their capital stock for three hundred and twenty-five thousand dollars to John E. Searles, Jr. It is not unworthy of notice that the resolution to sell is prefaced by a recital that their secretary had signed a deed of consolidation "under the belief that he was authorized so to do,"—a matter which had nothing to do with the new agreement to sell unless the purpose of that agreement lay beneath the surface. The committee to deliver the stocks consisted of the same three persons who had originally been authorized to make the agreement of consolidation, which had already been signed by Searles as treasurer of the Havemeyer Sugar Refining Company. The stock was delivered to him, the price paid to the stockholders, and so Searles became the one sole and only stockholder of the defendant company. He and the "legal entity" alone survived, and the latter apparently in a state of suspended animation. An effort was made to ascertain from what source the purchase-money came, but was not altogether successful. Searles did not furnish it. A certain committee of three did, who were to transfer the stock to the board. Searles adds: "Those three gentlemen whom I have named as trustees of certain funds paid for the stock; fund received by them for mortgages and other matters connected with the organization. Q. What organization? A. The Su-

gar Refineries Company, the board." Well, the board got the stock from Searles, sole owner and sole stockholder, and gave, in exchange, certificates for seven hundred thousand dollars, or a little more than double the purchase price, and which indicates the amount of water in the board's capital stock. From that, however, was deducted the fifteen per cent retained by the combination. What Searles did with the certificates we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became president of the corporation; that its share of the regular dividend has been allotted to it for its certificate-holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has done nothing; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all, and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There was corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust, and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such,—a proposition which, if sound, dominates the whole field of controversy, and establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal

and injurious, may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the state's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the state can put its finger and say, This the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the state may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce, as directors, in the wrong which as stockholders they have themselves helped to commit. That, again, is corporate conduct, though there be an utter absence of directors' resolutions. Is it asked, what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers, by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed. The answer is, that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial but the legal owners of the stock; and if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as molded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when beyond that corporate neglect they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors, who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our

eyes in willful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule, and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one, there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the state in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is, What, in a given case, has been that collective action and agency? As between the corporation and those with whom it deals, the manner of its exercise usually is material; but as between it and the state, the substantial inquiry is only what that collective action and agency has done; what it has in fact accomplished; what is seen to be its effective work; what has been

its conduct. It ought not to be otherwise. The state gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the state may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People ex rel. v. Kingston & M. T. R. Co.*, 23 Wend. 193, 35 Am. Dec. 551, "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust, and becoming an element of it, was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the state the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control.

When it had passed into the hands of the trust, only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the state required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their

power at any moment of disobedience. It can make no dividends, whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "overproduction." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the state had a right to expect and require. It has helped to create an anomalous trust, which is, in substance and effect, a partnership of twenty separate corporations. The state permits in many ways an aggregation of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership: *New York etc. Canal Co. v. Fulton Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whittenton Mills v. Upton*, 10 Gray, 596; 71 Am. Dec. 681. The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied. Indeed, in one of the papers added to the appellant's brief, it is not only admitted, but asserted and defended. That paper shows quite clearly that by force of the arrangement there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust, or combination, or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid, because the statute permits it: Laws of 1867, c. 960; Laws of 1884, c. 367. The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical

results without subjection to the prudential restraints with which the state accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the state, owing duties and obligations to the state, and subject to the control and supervision of the state, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute, the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed, and not, as here, a capital stock double that value at the outset, and capable of an elastic and irresponsible increase. The difference is very great, and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the state, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the state to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add

to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth, and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is opened to enormous combinations, vastly exceeding in number and in strength, and in their power over industry, any possibilities of individual ownership; and the state, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing; what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade, and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this state there can be no partnerships of separate and independent corporations, whether directly, or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints; but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed, with costs.

CORPORATIONS — FORFEITURE OF CORPORATE FRANCHISE. — The forfeiture of corporate franchises forms the subject of an elaborate note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179-202.

CORPORATIONS — PARTNERSHIP. — It is unlawful for corporations to enter in partnership with individuals or with other corporations: *Marine Bank v. Odgen*, 29 Ill. 248; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173.

CORPORATIONS—MONOPOLIES.— All combinations among persons or corporations, for the purpose of raising or controlling the prices of merchandise or any of the necessities of life, are monopolies, and should receive the condemnation of the courts: *Richardson v. Buhl*, 77 Mich. 633; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; and compare *People v. Chicago G. T. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319. A mercantile corporation cannot, under an agreement with other like corporations, place its business in the hands of a board of trustees, with power to manage the business of all the combining corporations, for the purpose of increasing its profits and stifling competition: *Gould v. Head*, 38 Fed. Rep. 886.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

ALSTON v. HAWKINS.

[105 NORTH CAROLINA, 2.]

PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME, or the rebuttal of such presumption, is a question of law, which, when the facts are established, the court must determine, and not leave to the discretion of the jury.

PAYMENT, PRESUMPTION OF. — When insolvency is relied upon to rebut the presumption of payment arising from lapse of time, the creditor must show that it existed during the entire statutory period next after the maturity of the debt.

PAYMENT, REBUTTING PRESUMPTION OF. — Non-residence alone is not sufficient to rebut the presumption of payment arising from lapse of time. It is, however, competent, when connected with other circumstances, such as insolvency, as tending to rebut such presumption.

PRESUMPTION OF PAYMENT — EVIDENCE TO REBUT. — Where the presumption of payment, arising from lapse of time, is the sole ground relied upon by the defendant, the evidence of a witness interested in the result of the action is inadmissible to rebut the presumption; otherwise, if actual payment is relied upon.

SUIT on a note dated August 4, 1856, on which credit of one hundred dollars was indorsed June 1, 1866. Defendant relied upon the presumption of payment. Plaintiff sought to rebut this presumption by proof of defendant's non-residence since 1857, and also introduced, over objection, the following letter from defendant:—

“CANEY POST-OFFICE, MATAGORDA CO., TEX.,

“March 23, 1871.

“*Dear Charles,*— I received your letter last week requesting me to send you five thousand dollars, which is impossible for me to do. All my crop of last year will not bring more

than five thousand dollars. I have not paid the thousand dollars I borrowed to send you. I promised to pay it out of last crop, which I will do. I owe other debts, but cannot pay them just now. I have had my property so fixed my creditors cannot disturb it; but I will pay every debt I owe in the world, but I must have a little time to do so. When I sell my sugar I will send you all the money I can. I expected to get some money from the bank. The suit has not been decided in the supreme court. I think I will recover half after a while. I have a full supply of hands this year, cultivating all the plantation. Hope to make a good crop this year. . . .

“Yours truly, JAMES B. HAWKINS.”

The court intimated that there was no evidence to rebut the presumption of payment. Plaintiff then took a nonsuit, and appealed.

J. B. Batchelor and John Devereux, Jr., for the appellant.

E. C. Smith, for the respondent.

SHEPHERD, J. “The presumption of payment arising from lapse of time under the statute is one which the law itself makes, and it has such an artificial and technical weight that whenever the facts are admitted or established, the court must apply it as an inference or intendment of the law; and so, too, the question whether that presumption has been rebutted is one of law, which, when the facts are ascertained, the court must determine, and not leave to the discretion of the jury”: *Ruffin, J., in Grant v. Burgwyn*, 84 N. C. 560.

It is well settled that when insolvency is relied upon to rebut the presumption, the creditor must show that it existed during the entire statutory period next after the maturity of the debt: *Grant v. Burgwyn*, 84 N. C. 560; *McKinder v. Littlejohn*, 4 Ired. 198; *Walker v. Wright*, 2 Jones, 156.

Applying these principles to the case before us, it is clear that the plaintiff has failed to rebut the presumption of payment arising from his long inaction. Assuming that the statute did not commence to run until the 1st of January, 1870, we have a period of seventeen years in which the plaintiff has made no effort whatever to enforce the payment of his claim. The only evidence as to the insolvency of the defendant during all of these years is contained in a letter written by him on March 23, 1871, and addressed to “Dear Charles.” It does not appear that this person is in any way connected with this debt, nor does the letter so identify the indebtedness

therein mentioned with the bond sued upon as to warrant us in holding that it amounts to an acknowledgment. Treating it, however, either as an acknowledgment, or, more properly, as evidence merely of insolvency at its date, there is no testimony as to the continuance of such insolvency during the succeeding sixteen years.

It needs not the citation of authority to show that this proof is insufficient to repel the presumption of payment. The learned counsel, however, insist that the non-residence of the defendant should have been submitted to the jury. In *Kline v. Kline*, 20 Pa. St. 503, Woodard, J., in speaking of this position, says that "if it had ever been held to be, it might be doubted whether the rule ought not to be abrogated now, since the facilities of intercommunication have multiplied so wonderfully in all directions. But such a rule has never been established. The states of this confederacy are not foreign countries in respect to each other. We have a common federative head and a common constitution, which secures to the citizens of each state all the privileges and immunities of citizens of the several states. The tribunals of Ohio are as open to the citizen of Pennsylvania as his own courts, and if he will not avail himself of his privileges, he may not take advantage of his own inaction to rebut a statutory presumption of law."

In the cases cited by the plaintiff (*Armfield v. Moore*, 97 N. C. 34, and *Lilly v. Wooley*, 94 N. C. 412), there are suggestions as to the hardship of requiring a creditor to resort to a distant forum in order to collect his debt; but the statute of presumption was not then under consideration, and the remarks of the justices who delivered the opinions cannot, therefore, be regarded as authority upon the question before us.

Especially is this true when we consider that this court has several times emphatically decided that non-residence alone is not sufficient to rebut the presumption. In *Campbell v. Brown*, 86 N. C. 376, 41 Am. Rep. 464, Ruffin, J., in delivering the opinion of the court, said that the presumption of payment is one "that may be rebutted by proof of circumstances which raise a stronger counter-presumption, and, as was said in *McKinder v. Littlejohn*, 4 Ired. 198, evidence of a change of residence, or even distant residence, may be received for this purpose in aid of other evidence, such as the insolvency and general destitution of the debtor. But we

know of no authority proceeding from this or any other court for saying that a mere change of residence is of itself sufficient wholly to prevent the presumption which the law, by an intendment of its own, raises from the lapse of the prescribed number of years, without something having been done on the part of the creditor to enforce the satisfaction of his demand."

Although non-residence is competent, when connected with other circumstances tending to rebut the presumption, we cannot hold that it is sufficient when the only circumstance with which it is to be considered is the insolvency of the debtor for only the second year of the statutory period, leaving the preceding year and the succeeding sixteen years wholly unaccounted for.

The furthest that the court has ever gone in this direction was in *McKinder v. Littlejohn*, 4 Ired. 198. There was evidence of the continuous insolvency of the debtor for twenty-five years, with the exception of eighteen months during the first seven or eight years, when it was shown that the defendant had property. During this time he was a non-resident of this state. The court said that "the circumstance of distance between the debtor and the creditor might, we think, be left to the jury, with the fact of a continuous insolvency during the residue of the twenty years, as some evidence that the debtor did not pay the debt during that small space of time. . . . The distance is material only as preventing the possession of property by the debtor for but a short period from counteracting the effect of insolvency as a circumstance repelling the presumption of payment. For if the debtor, living more than a thousand miles from the creditor, and in a situation between which and the place of the creditor's residence there was but little communication, should have had in possession property of value to pay the debt but for a very short time, so that the jury should think the creditor did not know of it, and could not get payment out of that property, it might be regarded as being substantially a continued insolvency, especially where, as here, the debtor seems barely to have had possession of property without its appearing how he got it and whether he had paid for it." It will be observed how cautious the court is in giving any efficacy to such evidence, even in a case of long and continued insolvency, and the decision is put upon the ground that, owing to the distance, the plaintiff might not have known of the possession of property by the defendant.

How different is the case before us. Here, as we have said, the only proof of insolvency are the declarations in the letter of 1871, from which it plainly appears that the debtor is in possession of considerable landed property, on which, he complains, there was only raised a crop of five thousand dollars the previous year. He calls it "my property," and frankly admits that he has had it so "fixed" that his creditors cannot disturb it. He has a suit in the supreme court, and thinks that he "will recover half after a while." He has "a full supply of hands" "cultivating all the plantation," and hopes to make a good crop. He is giving his whole attention to it. Surely this does not indicate such poverty as to render it impossible for the defendant to pay, nor are the circumstances of such a nature as to discourage the plaintiff from a vigorous effort to subject the property to the payment of his claim.

In McKinder's case, the testimony, as we have remarked, was considered, because it was improbable that the creditor knew of his debtor possessing property for the short period of eighteen months. In our case, the creditor is actually informed by the debtor of his possession of a large property, and of his effort to prevent his creditors from reaching it, thus furnishing to the creditor valuable written testimony which he could use in subjecting the property to the satisfaction of his claim. It would, we think, be stretching the principle of *McKinder v. Littlejohn*, 4 Ired. 198, very far, to hold that such testimony is legally sufficient to go to the jury.

The plaintiff further contends that the statute does not run during the absence of the debtor from the state, and for this he relies upon *Summerlin v. Cowles*, 101 N. C. 473. In that case, the late chief justice remarked that while there is no saving clause in the statute of presumption (Rev. Code, c. 65, sec. 9), "yet when it is adopted as a measure of time in which an action must be brought, it must, by reason of the same analogy, be accompanied with the qualification attaching to all limitations, and mentioned in section 9, preceding." This suggestion on the part of the learned chief justice was unnecessary to the decision of the case, as it will be observed that the defendant relied upon the statute of limitations. This will more particularly appear by an examination of the papers on file in this court.

We cannot consider the suggestion as authority, as it is entirely opposed to many cases in which the point was directly presented and distinctly decided to the contrary:

Headen v. Womack, 88 N. C. 468; *Houck v. Adams*, 98 N. C. 519; *Hamlin v. Mebane*, 1 Jones Eq. 18; *Hodges v. Council*, 86 N. C. 181; *Campbell v. Brown*, 86 N. C. 376; 41 Am. Rep. 464. His honor was correct in ruling that the testimony offered was not legally sufficient to rebut the presumption of payment.

We are also of opinion that Dr. Willis Alston was properly excluded as a witness for the plaintiff. He was interested in the result of the action, and falls directly within the inhibition of the code, section 580. It is urged that this section does not apply, because the defendant pleaded both the statute and actual payment. Where actual payment is pleaded and "relied" upon, the statutory prohibition has no application; but merely pleading actual payment does not prevent its operation. Here the defendant offered no testimony whatever, and "relied" solely on the presumption of payment arising from the lapse of time. It is very plain that our case is not within the exception: *Brown v. Cooper*, 89 N. C. 238.

Upon a review of the whole case, we are unable to find any error.

Affirmed.

PRESUMPTION OF PAYMENT FROM LAPSE OF TIME. — Independently of the statute of limitations, the law raises a presumption, in the absence of explanatory evidence, that a debt which has been due and unclaimed, and without recognition or payment of interest for twenty years, has been paid. This presumption is not conclusive. Still, the burden of proof is thrown on the creditor to show that payment of the debt has not been made: *Bentley's Appeal*, 99 Pa. St. 500; *Phillips v. Adams*, 78 Ala. 225; *Peter's Appeal*, 106 Pa. St. 340; *Lash v. Von Neida*, 109 Pa. St. 207; *White v. Moore*, 23 S. C. 456; *Didlake v. Robb*, 1 Woods, 680.

In *Bentley's Appeal*, 99 Pa. St. 500, the court said: "A debt which has been due and unclaimed, and without recognition for twenty years, in the absence of explanatory evidence, is presumed to have been paid. This presumption, *prima facie*, obliterates the debt, and the onus of proof is upon the creditor, not to establish a new contract, as in the case where a debt is barred by the statute of limitations, but to show that payment of the debt has not been made." To the same effect, *Gregory v. Commonwealth*, 121 Pa. St. 611, 6 Am. St. Rep. 804, where it is determined that all debts excepted out of the statute of limitations, unclaimed and unrecognised for twenty years, are presumed to have been paid. This presumption is an artificial rule of law, is not a bar to an action on the original contract, and therefore a new promise is not necessary to sustain such action.

The evidence to rebut the presumption of payment after twenty years must be satisfactory and convincing, especially when the suit is not brought until after the death of the debtor. In such case the defendant stands upon a presumption of law binding upon both court and jury, until overcome by proof, and the plaintiff in rebuttal must assume the burden of proof, and ad-

duce evidence sufficient, if believed, to counteract the presumption. Whether the evidence is true is a question of fact for the jury; whether it legitimately gives rise to the inference of non-payment is a question of law for the court. This case is followed in *Porter v. Nelson*, 121 Pa. St. 628; *Breneman's Appeal*, 121 Pa. St. 641; *Runner's Appeal*, 121 Pa. St. 649; and in accord with this holding is that in *Reed v. Reed*, 46 Pa. St. 239.

The rule as thus stated has been applied to all sorts of indebtedness, as, for instance, to bonds: *Smith v. Benton*, 15 Mo. 371; *Haskell v. Keen*, 2 Nott & McC. 160; *Cottle v. Payne*, 3 Day, 289; *Levy v. Hampton*, 1 McCord, 145; *Durham v. Greenly*, 2 Harr. (Del.) 124; *Tinsley v. Anderson*, 3 Call, 329; *Boyd v. Harris*, 2 Md. Ch. 210; *Delany v. Robinson*, 2 Whart. 503; *Denniston v. McKeen*, 2 McLean, 252; *Lowe v. Stowell*, 4 Jones, 235; *Rogers v. Bishop*, 5 Blackf. 108; *Bird v. Inslee*, 23 N. J. Eq. 363; *Morrison v. Funk*, 23 Pa. St. 421; *Wellingham v. Chick*, 14 S. C. 93; *Shubrick v. Adams*, 20 S. C. 49; *Lanston v. Shawls*, 23 S. C. 149. It is a well-settled rule of law that a bond is presumed to have been paid after the lapse of twenty years from its maturity. But this presumption may be repelled by satisfactory evidence. If less than twenty years have elapsed, the presumption does not arise; still, even then, lapse of time may be relied upon, in connection with other circumstances, as evidence of payment: *Booker v. Booker*, 29 Gratt. 65; *Norvell v. Little*, 79 Va. 141. The presumption that a bond has been paid, which arises after a lapse of twenty years, is not a legal bar. It is a presumption of fact which must be held conclusive, unless rebutted by satisfactory evidence that it has not been paid, or showing good and sufficient reasons why longer forbearance has been given. Thus where the parties reside in a county whose condition was such during the civil war as to render it highly improbable that debts would or could be collected during the time such war continued, this time should not be considered as forming part of the time whose lapse gives rise to the presumption of payment. If it is shown that by the understanding of the parties the bond was not to be paid until a future time, the time which elapsed from the giving of the bond, to such future time, should not be considered as forming any part of the time whose lapse gives rise to the presumption, though the bond on its face is payable on demand: *Hale v. Pack*, 10 W. Va. 145. A legal presumption of the payment of a bond given to secure the payment of money does not arise from mere lapse of time, where the bond has not been due for twenty years before the commencement of suit to recover on it. If a shorter period, even a single day less than twenty years, has elapsed, the presumption of satisfaction from mere lapse of time does not arise; and while the mere lapse of such time affords no presumption of law, that the debt is paid, still, payment may be inferred by the jury from circumstances though the lapse of time is short of the period of twenty years. So when an action is brought on a bond, if twenty years have elapsed between the time of its becoming due and of the institution of the suit, the defendant may, without pleading the statute of limitations, rely upon the presumption of payment; and upon issue joined or plea of payment, payment may be inferred from circumstances, coupled with lapse of time short of a period of twenty years: *Sadler v. Kennedy*, 11 W. Va. 187; *Calwell v. Prindle*, 19 W. Va. 604. The payment of a bond or covenant will not be presumed from the mere lapse of fourteen years from the time it was due: *Calwell v. Prindle*, 11 W. Va. 307. If the obligee in the bond is an infant when the cause of action accrues, payment will be presumed in five years after he attains full age, if that is twenty years from the accruing of the action. Payment made by heirs or devisees on the bond of their deceased ancestor will not destroy the

presumption of payment as against the estate of the ancestor: *Gibson v. Lowndes*, 28 S. C. 285; *Bartlett v. Bartlett*, 9 N. H. 398.

The same rule is applied to mortgages. Thus more than twenty years having elapsed since the maturity of the mortgage debt, the law will presume the mortgage satisfied: *Agnew v. Renwick*, 27 S. C. 562; *Bowie v. Poor School Society*, 75 Va. 300; *Pryor v. Wood*, 31 Pa. St. 142; *Inches v. Leonard*, 12 Mass. 379; *Jackson v. Wood*, 12 Johns. 242; *Sweetser v. Lowell*, 33 Me. 446. A mortgage is presumed to be satisfied, if no claim has been made and no interest paid upon it within twenty years after it became due, and no circumstances are shown to explain the delay and rebut the presumption: *Barned v. Barned*, 21 N. J. Eq. 245; *Downs v. Sooy*, 28 N. J. Eq. 55. In Vermont, the presumption of payment of a mortgage arises in fifteen years after its maturity: *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 6 Am. St. Rep. 144. A presumption of payment does not arise from the fact that no interest has been paid on the mortgage for nineteen years: *Boon v. Pierpont*, 23 N. J. Eq. 7. In *Jarvis v. Albro*, 67 Me. 310, the mortgagor remained in possession of the mortgaged premises for more than twenty years after the execution of the mortgage, and during that time there was no evidence that the mortgagee asserted any claim under the mortgage, nor that its validity was in any way recognised by the mortgagor; and the court said that "upon these facts a presumption arises that the mortgage had been paid, and ceased to be a subsisting title. This rule is so well settled that no citation of authority is needed. But this presumption is not conclusive upon the mortgagee. He may rebut it by proof that the mortgage debt had not been paid, and that the mortgage had not been extinguished." The presumption, based on lapse of time, that a mortgage has been paid, is one that can be rebutted by circumstances: *Baent v. Kennicutt*, 57 Mich. 268. But when the period of twenty years has elapsed, very slight evidence will sustain the presumption of payment arising from the lapse of time: *Pattie v. Wilson*, 25 Kan. 326. Still, the inference of payment arising from mere lapse of time is not sufficient to overcome convincing proof of non-payment: *Delaney v. Brunette*, 62 Wis. 615. In *Tripe v. Marcy*, 39 N. H. 439-448, the court said: "We have examined, however, a question that has been argued touching this point, and concur with the views of counsel for the defendant to this extent: that when the mortgagor is permitted to retain possession of the land for twenty years without interruption, the presumption is, that the mortgage debt has been paid, or had no valid existence, unless this presumption is repelled by the payment of interest, or other act recognizing the validity of the mortgage. This we conceive is established on great authority. But we are not prepared to hold that this presumption arises short of twenty years from the time the mortgage debt becomes due. Otherwise we might be asked to presume a debt paid before the stipulated time of payment has arrived. This presumption arises from the long delay to enforce payment; but surely no such delay can be charged until the time has arrived when the creditor is entitled to demand it. In this respect the presumption accords with the general provisions of our limitation laws, which limit suits to the time prescribed after the cause of action has accrued. When the mortgagee is in possession, the right of the mortgagor will be barred in twenty years from the entry of the breach of condition. So if the mortgagee suffers the mortgagor to remain in possession twenty years after breach of condition, payment is presumed. In both cases the time is reckoned from the breach of condition."

The unexplained possession, by a mortgagor, of premises for less than twenty

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years may be left to the jury, in connection with partial payments of the mortgage debt, as tending to show the debt fully paid: *Gould v. White*, 26 N. H. 178.

In the absence of proof that real estate decreed to be sold upon foreclosure of a mortgage in 1856 was ever sold, it may be conclusively presumed, in an action of ejectment commenced in 1883, that the mortgage debt was paid, and that the property was never sold: *Gage v. Downey*, 79 Cal. 140.

The presumption of payment also arises on notes or other evidence of indebtedness not under seal, and not paid within twenty years from maturity. Thus in an action on a note more than twenty years overdue, although the statute of limitations may not be a bar because of the maker's absence from the state, still there is a presumption of payment; and evidence that the holder was poor during that period is competent to fortify the presumption: *Bean v. Tonnela*, 94 N. Y. 381; 46 Am. Rep. 153. The presumption of payment arising from lapse of time is the same, whether the debt is evidenced by bond or note, and arises after the lapse of twenty years, and not before, in the absence of evidence rebutting the presumption. But the presumption may in all cases be rebutted: *Lash v. Von Neida*, 109 Pa. St. 207; *Clark v. Clement*, 33 N. H. 563; *Gregory v. Commonwealth*, 121 Pa. St. 611; 6 Am. Rep. 804; *Boyce v. Lake*, 17 S. C. 481; 43 Am. Rep. 618; *Dickson v. Gourdin*, 26 S. C. 391. The burden of proof is on the maker to show payment within twenty years, or facts from which the jury may properly infer payment: *Morrison v. Collins*, 127 Pa. St. 28; 14 Am. St. Rep. 827. The circumstance that the maker was able to pay will not rebut such presumption; still, this proof, together with a showing that the holder has been constantly pressed for money, may justify the finding of payment within the twenty years: *Morrison v. Collins*, 127 Pa. St. 28; 14 Am. St. Rep. 827. The absence of the debtor from the state during the greater part of the period relied upon to create the presumption will rebut it, but the fact that the debtor at a certain time during the period relied upon was bankrupt will not of itself have this effect: *Daggett v. Tallman*, 8 Conn. 168. In such case, the presumption may be aided or rebutted by surrounding circumstances rendering it probable that the note has or has not been paid within a period short of the twenty years: *Criss v. Criss*, 28 W. Va. 388. In calculating whether the twenty years have elapsed without payment, the time in which for any reason the creditor has no legal right to bring suit on the note must be excluded: *Criss v. Criss*, 28 W. Va. 388; *Boyce v. Lake*, 17 S. C. 481, 43 Am. Rep. 618; *Mason v. Sparlock*, 4 Baxt. 554.

Judgment against one of the obligors on a joint and several note will not rebut the presumption of payment arising in favor of the other obligor from the lapse of time; a voluntary payment, however, by one of such obligors, within the twenty years, will rebut the presumption of payment by the other: *Hall v. Woodward*, 26 S. C. 557. Proof that the surety on a note had said that the payee had promised him not to push him for payment during his, the surety's, lifetime is sufficient to rebut the presumption of payment: *Fisher v. Phillips*, 4 Baxt. 243. Where the note sued on was due in 1872, and payments thereon were made as late as 1879, the maker having failed between that time and 1883, when suit was brought, the court decided that lapse of time did not raise a presumption that the note was paid, and was not entitled to much consideration: *Walker v. Russell*, 73 Iowa, 340.

Where, in an action on a note, payment by the execution of a new note is pleaded by way of defense, the jury may consider, with other circumstances, the time which has elapsed since the time of the alleged payment, as the

presumption of payment arising from the lapse of time applies as well where a specific manner of payment is pleaded as where payment is alleged in a general way: *Manning v. Meredith*, 69 Iowa, 430. Where the debt is payable by installments, the presumption of payment arising from lapse of time applies to each installment as it falls due: *State v. Lobb*, 3 Harr. (Del.) 421. If a bill is filed to settle an account which accrued more than twenty years prior thereto, the presumption of payment will prevail, in the absence of proof of the justice of the claim, during that time: *Kingsland v. Roberts*, 2 Paige, 193; *Ellison v. Moffatt*, 1 Johns. Ch. 46.

As a general rule, the unexplained lapse of twenty years from the time that a judgment is rendered raises a legal presumption that it has been paid: *Campbell v. Carey*, 5 Harr. (Del.) 427; *Burton v. Cannon*, 5 Harr. (Del.) 13; *Clark v. Olement*, 33 N. H. 563; *Thomas v. Hunnicutt*, 54 Ga. 337; *Willingham v. Long*, 47 Ga. 540; *Bird v. Inslee*, 23 N. J. Eq. 363; *Thayer v. Mowry*, 36 Me. 287; *Chapman v. Loomis*, 36 Conn. 459. The presumption thus arising is, however, always rebuttable: *Knight v. McComber*, 55 Me. 132; *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349; *Burt v. Casey*, 10 Ga. 178; *Scott v. Isaacs*, 85 Va. 712; and evidence of payments on the judgment within that time, or admissions that it is due, will rebut the presumption: *Burton v. Cannon*, 5 Harr. (Del.) 13; *Bissell v. Jaudon*, 16 Ohio St. 498. Any lapse of time less than twenty years will not generally, *per se*, raise the presumption of payment: *Murphy v. Philadelphia Trust Co.*, 103 Pa. St. 380; *Daby v. Erricson*, 45 N. Y. 786. While the presumption of payment of a claim founded on a judgment does not arise until twenty years after its rendition, it is well settled that a shorter period than that, aided by circumstances which contribute to strengthen the presumption, may furnish sufficient grounds to justify the jury in inferring the fact of payment: *Briggs's Appeal*, 93 Pa. St. 485; *Moore v. Smith*, 81 Pa. St. 183; *West v. Brison*, 99 Mo. 684. In an early case in Arkansas, the court determined that after the lapse of ten years from the date of a judgment, the law presumes that it is paid: *Woodruff v. Sanders*, 15 Ark. 143. And this presumption is conclusive, unless the plaintiff, in the absence of any effort to enforce payment of the judgment, shows such facts and circumstances as will satisfy the jury that there were other reasons for the delay of the prosecution of the claim than the alleged payment: *Rector v. Morehouse*, 17 Ark. 131.

In Tennessee, the unexplained lapse of sixteen years raises a rebuttable presumption that a judgment has been paid: *Kilpatrick v. Brashear*, 10 Heisk. 372; *Bender v. Montgomery*, 8 Lea, 586; *Anderson v. Settle*, 5 Sneed, 202; *McDaniel v. Goodall*, 2 Cold. 391. The presumption of payment of a judgment arising from lapse of time is a general one, and applies as well between the parties to the judgment as between the plaintiff and subsequent creditors. In the absence of countervailing proof, it is a good defense to a *scire facias* to revive a judgment: *Van Loon v. Smith*, 103 Pa. St. 238.

The rules applied to judgments as to presumption of payment from lapse of time are also applied to the payment of legacies by administrators and executors. Thus the lapse of twenty years from the time when a legacy becomes payable, without claim or demand by the legatee, and without recognition of the right by the executor or administrator, creates a legal presumption of its payment: *Bonner v. Young*, 68 Ala. 35; *O'Brien v. Holland*, 3 Blackf. 490; *Oleson's Appeal*, 2 Grant Cas. 303; *Kerlee v. Corpening*, 97 N. C. 330; *Bentley's Appeal*, 99 Pa. St. 500; *Wingett's Appeal*, 122 Pa. St. 486; *Hooper v. Howell*, 52 Ga. 315; *Ragland v. Morton*, 41 Ala. 344. And a court of equity will not, in the absence of peculiar circumstances, entertain a bill to

compel distribution after the lapse of that time: *Worley v. High*, 40 Ala. 171. The presumption thus arising may be rebutted by satisfactory evidence: *Hayes v. Whitall*, 13 N. J. Eq. 241; the burden of proof being on the legatee to show that the legacy has not been paid: *Bentley's Appeal*, 99 Pa. St. 500; *Foulk v. Brown*, 2 Watts, 209. Proof of the death of a *feme covert* legatee, whose husband survived her, no administration having been taken on her estate, will not repel the presumption of payment of a legacy arising from lapse of time: *Foulk v. Brown*, 2 Watts, 209. Evidence that during the period the administrator has said to a stranger that he would not pay the legacy, because the legatee was rich enough without it, is insufficient to overcome the presumption of payment: *Bentley's Appeal*, 99 Pa. St. 500. Nor is the presumption rebutted by proof of disability, such as infancy or coverture on the part of the legatee: *McCartney v. Bone*, 40 Ala. 533. But where an executrix, having a discretion as to the payment of pecuniary legacies, notifies the non-resident legatees that she has the money on hand to pay them, and makes partial payment, this is a recognition of an express trust, and no presumption of payment arises, as against the legatees, until the lapse of twenty years: *Girard v. Futterer*, 84 Ala. 323. The presumption of payment of a legacy does not arise short of twenty years, unless aided by evidence of circumstances which raise the presumption. Thus the payment of a legacy will not be presumed in seven years: *Strohm's Appeal*, 23 Pa. St. 351.

The rule of presumption of payment from the lapse of twenty years applies to taxes. In *Hopkinton v. Springfield*, 12 N. H. 328, 330, the court said: "A presumption of payment arises in relation to bonds, mortgages, judgments, etc., after the lapse of twenty years, if there is no evidence to repel it, and to show that the debt is still unsatisfied. Taxes cannot have any higher character in this respect than debts due by specialty, and of record. The assessment is in the nature of a judgment, and the warrant for the collection operates like an execution. There is no reason, that we can discover, why the same principle should not be applied to them." The same doctrine is announced in *Dalton v. Bethlehem*, 20 N. H. 505; *Colebrook v. Stewartstown*, 28 N. H. 76; *Andover v. Merrimack County*, 37 N. H. 437. This presumption may be rebutted; but unless this is done, lapse of time, aided by other circumstances, will raise the presumption of payment: *Elliott v. Williamson*, 11 Lea, 38.

The due execution of a trust will be presumed after the lapse of twenty years: *Drysdale's Appeal*, 14 Pa. St. 531; and though a continuing trust may be presumed to be paid from the lapse of time, still, where the trust is recognized by the trustee as continuing, the presumption of payment, which otherwise would arise after the lapse of twenty years, is avoided, and an informal settlement made by him in the probate court, in which he charged himself with assets received, and claimed credits for disbursements, operates as such recognition: *Werborn v. Austin*, 82 Ala. 498.

Under the North Carolina statute a presumption of payment of bonds, notes, or other evidences of indebtedness arises in ten years from maturity: *Hall v. Gibbs*, 87 N. C. 4. This presumption is not one of law, but of fact, which may be rebutted by proof that no payment has been made, or such other facts as are sufficient in law to remove the presumption: *Long v. Clegg*, 94 N. C. 763. Thus the recognition of subsisting indebtedness by the personal representatives of the obligee in a bond, and a promise to pay the same, is sufficient to rebut the presumption of payment: *Tucker v. Baker*, 94 N. C. 162. So payment on a bond within ten years from maturity by the assignee

in bankruptcy of one of the obligors repels the presumption: *Belo v. Spach*, 85 N. C. 122. But the admission of one obligor, that a bond has not been paid, will not rebut the presumption in favor of his co-obligor, nor will the mere admission of the obligor sought to be charged have that effect; nor is the presumption against him rebutted by the recovery of judgment by default against his co-obligor within ten years: *Rogers v. Clements*, 98 N. C. 180.

In an action against the obligee in a bond, an admission that neither he nor his surety has paid the bond is sufficient to rebut the presumption of payment, nothing else appearing: *Cartwright v. Kerman*, 105 N. C. 1. But the admission of his administrator that he has not paid it will not rebut the presumption: *Grant v. Gooch*, 105 N. C. 278. The proof offered to repel the presumption of payment from lapse of time must, in order to be effectual, run through the entire period next after the maturity of the debt: *Roseland v. Windley*, 86 N. C. 36. Thus where insolvency of the obligor is relied upon, it must be shown to have existed during the entire period, thus establishing the inability of the obligor to pay: *Grant v. Burgwyn*, 84 N. C. 560.

In addition to what has already been said while treating this subject with respect to the different kinds of indebtedness to which the presumption has been applied, it may be here stated, as a general rule, that though the law does not raise a presumption of payment short of twenty years from the time when the indebtedness falls due, still there is no doubt that a shorter period than that, aided by circumstances which contribute to strengthen such presumption, may furnish sufficient grounds to the jury for inferring the fact of payment: *Briggs's Appeal*, 93 Pa. St. 485; *Davenport v. Labauve*, 5 La. Ann. 140; *Copley v. Edwards*, 5 La. Ann. 647; *Woolen v. Harrison*, 9 La. Ann. 234; *Fleming v. Emory*, 5 Harr. (Del.) 46; *Milledge v. Gardner*, 33 Ga. 397; *Atkinson v. Dancy*, 9 Yerg. 424; *Moore v. Pouge*, 1 Dra. 327; *Brubaker v. Taylor*, 76 Pa. St. 83; *Webb v. Dean*, 21 Pa. St. 29; *Tilghman v. Fisher*, 9 Watts, 441; *Williams v. Sims*, 1 Rich. Eq. 53; *Blake v. Quash*, 3 McCord, 205; *Garnier v. Renner*, 51 Ind. 372. This rule was applied in an action to revive a judgment nineteen years after it was rendered, in the absence of proof that execution had ever issued: *Diamond v. Tobias*, 12 Pa. St. 312; where the court said: "The rule is well established that where the period is short of twenty years, the presumption of payment may be aided by other circumstances besides the mere lapse of time. But exactly what these circumstances may be never has been and never will be defined by the law. There must be some circumstances; and where there are any, it is safe to leave them to the jury." In *Moore v. Smith*, 81 Pa. St. 182, more than sixteen years had elapsed since the rendition of a judgment, and the same doctrine was applied in an action to revive it.

In *King v. Coulter*, 2 Grant Cas. 77, the court said: "It was fifteen years, four months, and twenty-five days after the sealed note of the plaintiff's testator matured before this action was instituted for its recovery. No legal presumption of payment such as, unrebutted, the court would be bound to declare as a conclusion of law arose in that time; for the authorities all agree in fixing twenty years as the period necessary to such a presumption. But the question is, whether the time that did elapse was competent, in connection with such circumstances as were offered, to go to the jury as ground for their presuming payment of the note. The competency of such evidence does not depend on a particular period of years, though its effect will be proportioned to their number. The presumption strengthens as the time approaches to twenty years, and the circumstances needed to establish it may be measured by a diminishing scale. The further the time stops short

of twenty years the more cogent and decisive must be the circumstances relied upon; just as the further we advance beyond twenty years we require more persuasive circumstances to rebut the legal presumption. Twenty years assumed as the point for that presumption, the scale is reversed by which we measure the circumstances that tend to establish or countervail it. In both instances it is for the jury to apply the proofs under direction of the court. If evidence be offered which in the judgment of the court will, in connection with the lapse of time, reasonably tend to convince the jury that the debt has been paid short of twenty years, or that it has not been paid, notwithstanding that period, it is the duty of the court to receive it, and to submit it to the jury with such instruction as shall enable them to estimate it at what it is really worth. The point to be attained is moral conviction of the fact; and whilst it is not to be founded on evidence insufficient to convince reasonable men, we are not to exact mathematical certainty, nor to expect more than moral demonstration."

This rule was applied in *Hughes v. Hughes*, 54 Pa. St. 240, where a debt from a son to his father was overdue eighteen years and three fourths when suit was brought, and had been due over fifteen years during the lifetime of the obligor. To aid the presumption of payment from lapse of time, evidence was admitted to show the needy circumstances of the obligee, and the easy and solvent condition of the obligor. The court said: "Slight circumstances may be given in evidence for that purpose, in proportion as the presumption strengthens by the lapse of time; but still they must be such as aid the presumption arising from time. They must be, as it is said, persuasive that the time would not have been suffered to elapse had the debt remained unpaid." To the same effect, *Wood v. Egan*, 39 La. Ann. 684. In *Phillips v. Adams*, 78 Ala. 225, it was determined that to create the presumption of payment by lapse of time short of twenty years, positive evidence is not required. It may be established by circumstances such as will satisfy the jury that the continued existence of the debt is highly improbable, as where the vendor, though in necessitous circumstances, did not file his bill to enforce his lien on land until nineteen years from the date of the contract, and fourteen years after the death of the purchaser, and showed no excuse for his delay. If a bill is filed to enforce an alleged vendor's lien on land against a subpurchaser more than twelve years after the maturity of the debt, the complainant admitting that she and her husband, since deceased, well knew of the existence of the lien, but took no steps to enforce it, though very poor, and needing the money to supply the common necessities of life, and also knew that the purchaser became insolvent in less than one year from the date of the contract, but interposed no objection to a sale publicly advertised, these facts raise a strong presumption of payment: *May v. Wilkinson*, 76 Ala. 543. Slight circumstances may be left to the jury on the issue of payment of a bond when sixteen years have elapsed: *Blackburn v. Squibb*, Peck, 60. And the lapse of fourteen years after the last installment on a bond and mortgage fell due, taken in connection with other facts tending to prove payment, is sufficient to raise the presumption of payment: *Bauder v. Snyder*, 5 Barb. 63.

In *Milledge v. Gardner*, 33 Ga. 397, a period of over nineteen years had elapsed from the accrual of the cause of action on a note to the bringing of the suit, and during that time the debtor was solvent, and the holder insolvent; and besides, the holder had been compelled to pay a debt due by the debtor as his security, and on a settlement, the debtor had given him and another's note to a third person for the balance, which note had been reduced

to judgment by such holder. The court considered these facts, unexplained, as sufficient to raise the presumption of payment.

The presumption of payment arising from the lapse of twenty years, or a shorter period of time, may be rebutted by any evidence which is sufficient to satisfy the minds of the jury that the debt has not in fact been paid. An acknowledgment of an existing indebtedness, within the period required to raise the presumption, is sufficient to rebut it. More than twenty years had elapsed after a bond became due, a settlement took place between the respective parties to it, and the obligor then acknowledged the bond to be due and unpaid, — this was considered sufficient to rebut the presumption of payment: *Eby v. Eby*, 5 Pa. St. 435. So an admission that the debt has not been paid, with a positive declaration by the debtor that he does not intend to pay it, rebuts the presumption: *Reed v. Reed*, 46 Pa. St. 239. And evidence that demand for payment was made where the obligor, in a bond, acknowledged that it was unpaid, and gave some property to be applied in payment, which was entered as a credit on the bond, is sufficient, with other circumstances, to rebut the presumption of payment: *White v. Beaman*, 96 N. C. 122. If the debtor acknowledges a bond as a subsisting obligation within thirteen years after its maturity, the currency of presumption of payment dates only from the acknowledgment: *Roberts v. Smith*, 21 S. C. 455. So where the mortgagor acknowledged, in writing, that his mortgage, on which nothing had been paid, was still a valid security, such acknowledgment destroys the presumption of payment from lapse of time: *Murphy v. Coates*, 33 N. J. Eq. 424. And again, where judgment is rendered on a claim secured by mortgage of the judgment debtor, and where, in a subsequent action to foreclose the same within fifteen years from the date of the claim, he consents to a decree ordering the sale of the mortgaged premises, and that the proceeds may be applied to discharge the amount in the decree found to be due on the claim embraced in such judgment, such consent is an acknowledgment of an existing indebtedness upon the judgment, and an action thereon will not be barred until the expiration of fifteen years from the date of the acknowledgment: *Bissell v. Jaudon*, 16 Ohio St. 498.

Part payment of the debt at any time within the period required to raise the presumption of payment will rebut it; thus payment of interest on a bond by the principal will rebut the presumption of payment as well to the surety as to himself: *Dickson v. Gourdin*, 26 S. C. 391; 29 S. C. 343. So payment on a bond within the time required to raise the presumption of payment by the assignee in bankruptcy of one of the obligors repels the presumption arising from lapse of time: *Belo v. Spach*, 85 N. C. 122; *Hamlin v. Hamlin*, 3 Jones Eq. 191.

The presumption of payment arising from lapse of time may also be rebutted by showing the inability of the debtor to pay the debt because of his insolvency during all, or nearly all, the time since the indebtedness became due. In *Farmers' Bank v. Leonard*, 4 Harr. (Del.) 536, this rule was applied to the payment of a judgment, and the court said that "the indigent circumstances of a debtor, his hopeless insolvency and inability to pay his debts, are properly admissible in evidence for the purpose of repelling presumption of payment or satisfaction, arising from lapse of time." To the same effect, *McLellan v. Crofton*, 6 Me. 307-334. Where the insolvency of the debtor is shown to have existed during the greater portion of the time, proof of a short interval of solvency, of which the creditor was ignorant, will not affect the rebuttal of the presumption of payment: *McKinder v. Littlejohn*, 4 Ired. 198; 1 Ired. 66. The issuance and return of an execution *nulla*

bona is a circumstance rebutting the presumption of payment of a judgment from lapse of time: *Black v. Carpenter*, 3 Baxt. 350.

As is shown by the principal case, insolvency of the debtor relied upon to rebut the presumption of payment must be shown in North Carolina to have existed during the entire statutory period: *Grant v. Burgwyn*, 84 N. C. 560. The insanity of the debtor will rebut the presumption of payment arising from lapse of time: *McLellan v. Crofton*, 6 Me. 334. So the near relation of the parties may repel the presumption; thus the situation of the parties, the mortgagor having married the daughter of the mortgagee, and had issue, is of itself sufficient to rebut the presumption. In other words, the fact that the parties interested were nearly related, and the collection of the money might have occasioned distress, and even the payment of interest inconvenience, taken in connection with the fact that part of the money included in the mortgage was an advancement, and not to be repaid, is sufficient to repel the presumption of payment arising from the lapse of twenty years: *Wanamaker v. Van Buskirk*, 1 N. J. Eq. 685. The existence of war, preventing the creditor from maintaining suit, will rebut the presumption. Hence if the parties to a bond reside in a country, the condition of which during war is such as to render it highly improbable that debts could or would be collected during that time, it should not be considered as forming part of the time whose lapse gives rise to the presumption of payment: *Hale v. Pack*, 10 W. Va. 145; *Jackson v. Pierce*, 10 Johns. 414; *Bailey v. Jackson*, 16 Johns. 210; 8 Am. Dec. 309; *Dunlop v. Ball*, 2 Cranch, 184. So the intent or agreement of the parties may be shown to rebut the presumption, as where it is proved that by the understanding of the parties by whom a bond was executed that it was not to be paid until a future time, although the bond on its face was payable on demand, the time which elapsed from the giving of the bond to such future time should not be considered as forming any part of the time whose lapse gives rise to the presumption of payment: *Hale v. Pack*, 10 W. Va. 145. So where a surety on a note against which a presumption of payment from lapse of time was asked during the time to sell his land to another, but replied that he could not, as his creditor, if he did, would push him on his note, which he had promised not to do during his lifetime,—this will rebut the presumption of payment: *Fisher v. Phillips*, 4 Baxt. 243. A deed of trust was made and recorded in 1841; afterwards there were repeated sales of the land by the grantor and those claiming under him, the purchasers having no actual notice of the deed of trust until 1876; the court ruled that the presumption of payment was rebutted by the circumstances of the case: *Bowls v. Poor School Society*, 75 Va. 300. The presumption of payment from lapse of time is also treated in the note to *Husby v. Maples*, 88 Am. Dec. 590.

DUKE v. MARKHAM.

[105 NORTH CAROLINA, 131.]

CORPORATIONS — RATIFICATION. — THE ASSENT OF A MAJORITY OF THE STOCKHOLDERS TO THE EXECUTION OF A CORPORATE MORTGAGE, expressed elsewhere than at a regular meeting, and given separately and at different times to a person not authorized by law or resolution to execute mortgages for such corporation, is not binding upon it; nor does the receipt and use of the proceeds of such mortgage by the corporation render it binding upon the latter.

CORPORATIONS — MORTGAGE NOT UNDER SEAL — PRESUMPTION. — While a seal is not essential to the validity of a chattel mortgage alleged to have been executed by a corporation, still, in its absence, there is no presumption that the act is a corporate act, and it devolves upon the party relying upon the mortgage to show that the officer or agent had authority to execute it.

CORPORATION — MORTGAGE, EXECUTION OF — REGISTRATION. — In the absence of proof of the proper execution and acknowledgment of a corporate mortgage, its registration is unauthorized, and ineffectual to pass title as against creditors or purchasers.

ACTION of claim and delivery. Judgment for plaintiff, and defendant appeals.

J. S. Manning and F. L. Fuller, for the appellant.

R. B. Boone and W. A. Guthrie, for the respondent.

CLARK, J. This was a claim and delivery proceeding brought against defendant, who, as sheriff of Durham County, had taken possession of certain personal property of a corporation — the Durham Sash, Door, and Blind Manufacturing Company — by virtue of executions in his hands, and had advertised the same for sale. The plaintiff claims the property by virtue of the mortgage of November 15, 1888, given to indemnify him against loss as surety to said company upon a note to the bank, which would fall due November 15, 1889. The conclusion of the mortgage and the probate are in the following words: —

“In witness whereof, the Durham Sash, Door, and Blind Manufacturing Company sign by the names of president, secretary, and treasurer, and two stockholders, and attest their seals.

“W. F. REMINGTON, President.

“L. W. GRISSOM, Sec. and Treas.

“W. A. WILKERSON, Stockholder.

“WALTER WILKERSON, Stockholder.

“Witness: GEO. W. WATTS.”

"NORTH CAROLINA. — Durham County.

"The execution of the foregoing instrument was this day acknowledged on the part of L. W. Grissom, and proven on the oath and examination of L. W. Grissom as to W. F. Remington, W. A. Wilkerson, and Walter Wilkerson. Let the same, with this certificate, be registered.

"This November 15, 1888.

"D. C. MANGUM, C. S. C."

We think his honor erred in admitting the mortgage in evidence upon such probate, and likewise in instructing the jury, upon the proof offered by plaintiff, that it was valid as to creditors whom defendant represented by virtue of the executions in his hands.

In *Peirce v. New Orleans Building Co.*, 9 La. 397, 29 Am. Dec. 448, it is held that the act of a majority of the stockholders, expressed elsewhere than at a meeting of stockholders, as where the assent of each one is given separately and at different times, is not binding on the corporation. The same is true of a meeting of which notice is not given: *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99, and note; Cook on Stockholders, sec. 594; 1 Potter on Corporations, sec. 836, and notes.

In *Leggett v. New Jersey M. & B. Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728, it is held that a corporation is only bound by an agent's acts when within the scope of his authority, and that a president and cashier, as such, cannot execute a mortgage of corporate property without special authority from the board of directors or the stockholders, and that the proceeds of a mortgage have been applied to the use of the corporation in paying its debts, or otherwise, is not sufficient to render the mortgage binding if its execution was not properly authorized.

"The members of a corporation cannot, separately and individually, give their consent in such manner as to bind it as a collective body, for in such case, it is not the body that acts; and this is no less the doctrine of the common than of the Roman civil law. Being lawfully assembled," says Ayliffe, "they represent but one person, and may, consequently, make contracts, and by their collective assent, oblige themselves thereunto. And though all the members of a corporation covenanted on behalf of it under their private seals," this, it was held, would only bind them personally, and not the corporation: Angell and Ames on Corporations, sec. 232, which is supported by the numerous cases there cited. Again, in the same work (section 504): "The separate action, individually,

without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with corporate powers." Indeed, the authorities upon this subject are numerous, uncontradicted, and supported by reason.

It is true, the common seal is *prima facie* evidence that a deed or contract is the act of the company, and that the seal has been affixed by authority, though it is competent to go behind the seal and show that it was not affixed by legally exercised authority of the company. In this case there was no common seal of the company attached. While a seal is not essential to the validity of a chattel mortgage, in the absence of the company's seal there is no presumption of its being the corporation's act, and it devolves upon the party relying upon the mortgage to show that the agent or officer had authority to execute it. The plaintiff's witness testifies that there was no resolution of stockholders or directors to authorize the mortgage, and no record to that effect is entered on the books of the company; that he went around privately and saw a majority of the stockholders, and they authorized him to execute the mortgage; and that he requested the president and two directors to sign. A corporation can only act in the manner authorized by law. If, by the meeting of stockholders (or of the directors, if they have, by the charter, the right), the secretary of the company had been authorized to execute this mortgage, or mortgages generally, the mortgage might have been valid; but, as we have seen, no authority can be derived in this irregular manner, by an officer going around privately to what he alleges was a majority of the stockholders, and getting their consent. There is nothing to show that they were a majority, and that they did consent, as would be the case if a meeting were regularly held, the vote taken, and a minute entered on the company records. To give validity to such proceedings would lead to irremediable evils and abuses. The corporation seal not being attached, it was incumbent on the plaintiff to look to the authority of the agent with whom he dealt. Since it was not in the scope of the secretary's authority, as such, to execute the mortgage, and no legal authority to execute the same especially was given, it goes for naught. The receipt and use of the money is not of itself, as we have seen, a sufficient ratification by the corporation. But it is immaterial here whether there was a subsequent ratification or not. Ratification would be good between

the corporation and the mortgagee, but would not validate, as to other creditors, a mortgage which was invalid when registered.

The mortgage is not good at common law for want of authority to the secretary to execute it, nor is it good as a statutory mortgage under the Code, section 685; for there is no common seal attached, as required by that section, and the probate shows that as to the president and the two stockholders, there was no legal proof of its execution by them. They neither acknowledged the same, nor was it proven by the examination of the subscribing witness, as required by the Code, section 1246, subdivision 1. Indeed, under the words of the statute (Code, sec. 685), it may be that more than one witness is necessary. In *Todd v. Outlaw*, 79 N. C. 235, 237, Bynum, J., says: "Until a deed is proved in the manner prescribed by the statute, the public register has no authority to put it on his book; the probate is his warrant, and his only warrant, for doing so: *Williams v. Griffin*, 4 Jones, 31; *Burnett v. Thompson*, 3 Jones, 113; *Lambert v. Lambert*, 11 Ired. 162; *Carrier v. Hampton*, 11 Ired. 307. Not having been duly proved, the registration was ineffectual to pass the title as against creditors or purchasers: *Robinson v. Willoughby*, 70 N. C. 358; *Fleming v. Burgin*, 2 Ired. Eq. 584; *De Courcy v. Barr*, Busb. Eq. 181." To same effect is *Evans v. Etheridge*, 99 N. C. 43.

Error.

CORPORATIONS — MORTGAGE. — A mortgage signed by the trustees individually, and not by the corporation by its trustees, is not a legal mortgage of the corporation, but may nevertheless, in certain cases, be enforced in equity, and without reformation: *Love v. Mining Co.*, 32 Cal. 639; 91 Am. Dec. 602. For the act of a majority of the stockholders expressed elsewhere than at a meeting of the stockholders, as where each one has given his assent to a proposition at different times, is not binding on the corporation: *Peirce v. New Orleans B. Co.*, 9 La. 397; 29 Am. Dec. 448.

CORPORATIONS — SEAL. — The deed of a corporation without the corporate seal, executed by the trustees of the corporation, is not admissible in evidence, unless the authority of the trustees to execute it be shown; and a recital of such authority in the body of the deed is no evidence of its existence: *Gashwiler v. Willis*, 33 Cal. 11; 91 Am. Dec. 607. In *McElroy v. Nucleus Ass'n*, 131 Pa. St. 393, it was decided that, under a charter providing that the corporate property should be purchased and managed by a board of trustees, a mortgage for the purchase price of realty, executed by the president and secretary, without the corporate seal, not ratified by a corporate resolution, would be invalid against the corporation. Compare note to *Leggett v. N. J. M. & B. Co.*, 23 Am. Dec. 744, 745.

REGISTRATION OF INSTRUMENTS. — Void instruments are not legally entitled to be recorded: *Stone v. French*, 37 Kan. 145; 1 Am. St. Rep. 237; and if actually recorded, impart no notice: *Oglesby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177; *Musgrove v. Bonser*, 5 Or. 313; 20 Am. Rep. 737. A deed or a mortgage must be legally entitled to record and duly recorded, to make it operate as constructive notice: *Pringle v. Dunn*, 37 Wis. 449; 19 Am. Rep. 772. And instruments can only be admitted to record upon the proper acknowledgment and proof of their execution: *Stimpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228; *Ely v. Wilcox*, 20 Wis. 523; 91 Am. Dec. 436, and note. So held in the case of a mortgage: *Shepherd v. Burkhalter*, 13 Ga. 443; 58 Am. Dec. 523.

HELMS v. GREEN.

[105 NORTH CAROLINA, 251.]

FRAUDULENT CONVEYANCES — PLEADING FRAUD IN EXECUTION SALE. — A party seeking to set aside a conveyance because of a fraudulent combination to prevent a fair competition among bidders at an execution sale must allege the facts in his pleadings which are relied upon to establish the fraud.

FRAUDULENT CONVEYANCES — DEED, HOW ATTACKED. — In an action for the recovery of land, any deed offered as a link in the chain of title is thereby exposed to attack for incapacity in the maker, or because it is void under the statute of frauds, though it may not have been mentioned in the pleadings.

EVIDENCE — EXAMINATION OF ADVERSE PARTY. — A party, in support of the allegations of his complaint, or of a cross-action set up in a counterclaim, after eliciting admissions from the adverse party by verifying his pleadings, may examine him as to facts within his peculiar knowledge both before and at the trial, under the North Carolina Code abolishing discovery under oath.

WITNESS — EFFECT OF CALLING ADVERSE PARTY. — A party who puts his adversary on the stand gives him an opportunity to testify in his own behalf, and waives his right of impeaching him by attacking his credibility, but retains the right of contradicting him by the testimony of other witnesses inconsistent with his.

FRAUDULENT CONVEYANCES, EVIDENCE OF. — The notorious insolvency of a grantor at the time he executes a deed to his son-in-law is a circumstance tending to show that the grantee is a participant in the fraud against creditors.

FRAUDULENT CONVEYANCES — WHAT CREDITORS MAY ATTACK. — DEED EXECUTED TO EVADE PAYMENT OF ANY JUDGMENT that might be recovered against the grantor in an action for slander then pending against him is fraudulent and void as to his creditors.

FRAUDULENT CONVEYANCES, EVIDENCE OF. — If a debtor much embarrassed conveys property of great value to a near relative, and the transaction is secret, and known to no one but the parties, it is regarded as fraudulent; but if they are made witnesses in a case, and testify to the fairness and *bona fides* of the conveyance, and that there was no purpose of secrecy, the jury must then determine the intent which influenced the

parties, and, from the evidence, find the conveyance fraudulent or otherwise.

FRAUDULENT CONVEYANCES, EVIDENCE OF. — The exclusive power of near relatives to explain every suspicious circumstance connected with a conveyance between themselves if they acted in good faith, and the neglect to do so voluntarily, or the failure of one, when forced to testify, to fully establish the *bona fides* of the transaction, is deemed as due to inability to show conduct consistent with an honest purpose; and the presumption of fraud arises rather from the peculiar knowledge of the parties to the deed of facts that would either confirm or remove suspicion raised by the evidence as to the embarrassment of the grantor and his relationship to the grantee and the failure to prove what they know, than from any positive evidence as to the persons actually present at the transaction.

FRAUDULENT CONVEYANCES, EVIDENCE OF. — BADGES OF FRAUD are suspicious circumstances that overhang a transaction; and where the parties to it withhold evidence which is exclusively within their power to produce, and which would remove all uncertainty if believed, the law interprets such conduct most unfavorably to the suppressing party.

ACTION for the recovery of a tract of land. Plaintiff showed title in one W. B. Hinson, and then gave in evidence a regular recorded sheriff's deed to the land, dated February 15, 1882, conveying it to plaintiff under an execution sale upon judgment against said Hinson. Defendant then gave in evidence a deed of the same land to himself from said Hinson and wife, executed March 30, 1881, and recorded in April, 1885, reciting a consideration of three hundred dollars. Defendant also showed possession of the land in himself. Plaintiff then called defendant as a witness, and proposed to prove by him that his deed was fraudulent and void. This was objected to on the ground that the deed could not be attacked for fraud in the present action. The objection was overruled, and exception taken. The witness then testified that he was the son-in-law of said Hinson; that his deed was dated when executed; "that he took possession of the land shortly after he got the deed; that he was to pay two hundred dollars for the land; that he did not agree to pay more; that he gave his note to Hinson for the two hundred dollars; that he has never paid anything on the note; that he gave no security for the payment of the note, nor did he give any mortgage to secure the note; that he didn't know whether or not Hinson was insolvent at the time he executed the deed to witness; that witness was never examined in supplemental proceedings taken out against Hinson; didn't know of Hinson conveying away other lands about that time to his (Hinson's) other son-in-law; didn't know whether Hinson, at the time of the conveyance to witness, retained sufficient property to pay his (Hinson's) debts;

that he heard that Hinson was put in jail for refusing to testify in supplemental proceeding instituted against him; that witness at the time of said conveyance, and from then to the trial of this case, was not worth more than his homestead and personal property exemption; that witness and wife of witness own 148 acres of land besides the land in dispute in this case; that the deed for the 148 acres was made to witness and his wife jointly, and was partly a gift and partly a purchase; that one hundred acres was given and forty-eight bought, and witness paid \$240; that Hinson conveyed this 148-acre tract to witness and his wife four or five years after witness married Hinson's daughter; that witness now owns \$150 worth of personal property, and is worth about the same now that he was when the deed for the land in dispute was executed to him. Hinson was considered good, or solvent, till a short time before he executed the deed to witness for the land in dispute. Witness, on cross-examination, testified that there was no understanding between him and Hinson that he was to take the deed for the land in dispute for the purpose of keeping off Hinson's creditors; that, in his opinion, the land conveyed to him (the land in dispute) was not worth more than two hundred dollars, it being in litigation or in dispute at the time it was conveyed to him." Plaintiff then proposed to introduce other evidence, tending to prove the deed from Hinson to defendant to be a fraud on creditors. Objection was made on the ground that plaintiff, having made defendant his own witness, could not impeach nor contradict him. The court ruled that though plaintiff could not impeach such witness, he might introduce evidence contradicting him. Defendant excepted to the ruling of the court. Plaintiff then proceeded to prove by several witnesses that at the time of the execution of such deed the grantor therein was notoriously insolvent, and in his own behalf testified that the land embodied in the deed amounted to one hundred and twenty-five acres, worth from five to six dollars per acre, and his testimony was corroborated by that of other witnesses. "E. H. Hinson also testified that at the time said deed was executed, he (the witness) had a suit pending against said W. B. Hinson, in which he had sued for the recovery of ten thousand dollars, on account of alleged slanderous charges made against him by said W. B. Hinson, and that W. B. Hinson, before witness sued him, was solvent, and worth three thousand five hundred dollars or seven thousand dollars. It was also in evidence that at the time of the

execution of said conveyance to Green, one James Mullis had commenced suit against said W. B. Hinson for the recovery of five thousand dollars on account of alleged slanderous charges made against said Mullis by said W. B. Hinson, and that said suit afterwards abated on account of the death of plaintiff, Mullis." "Plaintiff offered in evidence, further, the following deeds from W. B. Hinson to his sons-in-law, D. R. Pusser and J. W. Love: Deed to D. R. Pusser, dated December 23, 1880, conveying a tract of land, and reciting a consideration of \$1,000 as paid; and to J. W. Love, dated February 14, 1880, conveying a tract of land, and reciting a consideration of \$275 as paid; a deed to J. W. Love, dated December 24, 1880, conveying a tract of land, and reciting a consideration of \$325 as paid; and another deed to said J. W. Love, dated the eleventh day of March, 1881, conveying a large body of land, and reciting a consideration of \$6,500 as paid." Other facts appear from the opinion. Judgment for plaintiff, and defendant appeals.

D. Covington and H. B. Adams, for the appellant.

J. J. Vann, for the respondent.

AVERY, J. At an early period in the judicial history of this state, it was held that courts of law might hear evidence and allow a jury to pass even incidentally upon the question whether a deed was void for fraud in the *factum* or under 13 or 27 Elizabeth: Code, secs. 1545, 1546; *Logan v. Simmons*, 1 Dev. & B. 16. Hence, in the trial of actions of ejectment, where the question arose whether a deed, relied upon by either of the parties as a part of a chain of title, was executed to hinder, delay, or defraud creditors, evidence was heard to attack or sustain such conveyances, though the action was not brought to directly impeach its character: *Lee v. Flannagan*, 7 Ired. 471; *Hardy v. Skinner*, 9 Ired. 191; *Hardy v. Simpson*, 13 Ired. 132; *Black v. Caldwell*, 4 Jones, 150; *Winchester v. Reid*, 8 Jones, 377; Wharton on Evidence, sec. 931.

Where land has been sold at execution sale, a party seeking to set aside the sheriff's deed because of a fraudulent combination to prevent a fair competition among bidders was compelled to file his bill formerly in a court of equity, and must now allege such facts in his pleadings as are relied upon to establish the fraud: *Young v. Greenlee*, 82 N. C. 346. But in actions for the recovery of land, as in the old action of ejectment, any deed offered as a link in a chain of title is

thereby exposed to attack for incapacity in the maker or because it was void under the statute of frauds, though it may not have been mentioned in the pleadings: *Jones v. Cohen*, 82 N. C. 75; *Fitzgerald v. Shelton*, 95 N. C. 519. It is this distinction that makes the authorities cited and relied on by defendant's counsel inapplicable in the case before us.

The defendant asked the court to instruct the jury that, — "4. Even if said deed was executed by W. B. Hinson with the actual intent to defraud his creditors, still the plaintiff cannot recover unless the plaintiff satisfies you that the defendant, Green, co-operated in said fraudulent intent, or had notice thereof."

The court gave the instruction, adding the words, "unless it was a voluntary deed, and not sufficient property was retained to pay Hinson's debts." And the defendant further prayed for the charge that, — "5. Even if W. B. Hinson was notoriously insolvent, and the defendant knew it at the time said deed was executed, the law raises no presumption that Green knew that Hinson intended to defraud his creditors," to which the judge added, "It is a circumstance, however, to be weighed."

It was eminently proper that the qualifying words should have been attached by the court in both instances. There was evidence tending to show that Hinson was embarrassed with debt, and that he did not retain property sufficient and available to discharge his indebtedness. A number of witnesses testified that he was reputed to be insolvent. The defendant, Green, claims under a deed from Hinson and wife, executed March 20, 1881, but proven and recorded in April, 1885. He offers the tax-lists, showing that for the year 1881 W. B. Hinson returned \$1,060, and for the year 1882, \$1,585, consisting entirely of personal and almost exclusively of "unspecified property." We cannot concede the correctness of counsel's position that the evidence tending to show fraud was rebutted by the return of property the nature of which was not pointed out, and most of which, we must infer, could not have been reached by an ordinary *feri facias*. There was evidence that made it proper that the judge should modify the fourth instruction as he did. Hinson had not only disposed of all of his lands to different members of his family, at what witness said were inadequate prices, and afterwards returned for taxation property that did not appear to be within the reach of the ordinary process of law to subject it for debt, but the execu-

tion of the deed when no persons but members of the family were present, as insisted, the failure to register, the great discrepancy between the recited and alleged prices, the wide difference between the aggregate amount recited as consideration in the deeds to different members of his family and the amount upon which Hinson paid taxes soon after, and other circumstances, certainly justified the argument to the jury, and would have supported a finding by them that the deed to Green was voluntary, and that in fact no money was paid by him to Hinson for the land.

The fact that the defendant, Green, was examined by the plaintiff as a witness does not preclude the latter from insisting before the jury that his testimony was not and that of witnesses who contradicted him was true, nor prevent the judge from submitting any view of the law predicated upon that hypothesis.

The Code, section 579, abolishes the action to obtain discovery under oath, and provides that no "examination of a party shall be had on behalf of the adverse party except in the manner prescribed in this chapter." The four succeeding sections, after providing how a party may be compelled to appear and answer both before and at the trial, conclude with the provision (section 583) that "the examination of the party thus taken may be rebutted by adverse testimony." The rules prescribed in that chapter for regulating such examinations, interpreted according to their plain import, and construed in connection with section 268 of the Code, furnish a substitute equal to the old bill of discovery as a means of eliciting material facts within the peculiar knowledge of an adversary party, and which, moreover, harmonize with the general idea of the code system by obtaining the discovery and the remedy sought by the party asking it in the same action: *Coates v. Wilkes*, 92 N. C. 382. The allegations of the complaint, and every material allegation of new matter constituting a counterclaim in an answer, directly admitted or not denied, have the effect of a finding by a jury: *Bonham v. Craig*, 80 N. C. 224. When the pleadings are complete, other material facts may be elicited from an adversary by examination in support of the main action, or the cross-action set up in the counterclaim, if the disclosures by way of admissions are not deemed sufficiently full. A party who puts his adversary on the stand gives him an opportunity to testify on his own behalf on cross-examination, and waives his right of

impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his: *Coates v. Wilkes*, 92 N. C. 382; *Turner v. McIlhane*y, 8 Cal. 575; *Teel v. Byrne*, 24 N. J. L. 631; *Drake v. Eakin*, 10 Cal. 312; Wharton on Evidence, secs. 488, 489. We think, therefore, that neither the defendant's second assignment of error, nor his exception to the refusal to give his instructions numbered 8 and 9, can be sustained.

The judge unquestionably stated the law correctly when he told the jury that the notorious insolvency of Hinson, if admitted, as set forth in the prayer of defendant, would be a circumstance tending to show that the defendant was a participant in the fraud; and we concur in the propriety of modifying the original proposition drawn by defendant, as it was qualified by the addition made by the court.

The declared object in enacting 13 Elizabeth was to avoid and abolish "feigned gifts, grants, alienations, etc., which may be contrived and devised of fraud, to the purpose and intent to delay, hinder, and defraud creditors and others of their just and lawful actions and debts." So that if Hinson had conveyed to Green in order to evade the payment of any judgment that might be recovered in an action for slander then pending against him, the deed must be treated as fraudulent in so far as it affected the rights of creditors, such as the plaintiff in the execution under which G. W. Helms bought: 2 Blk. 436; 2 Atk. 481.

The defendant asked the court to instruct the jury that "even though the purchase-money agreed to be paid may have been less than the actual value of the land, this can raise no presumption against the defendant; for it is in proof that the land was involved in litigation, and this fact may well explain the inadequacy of price."

In lieu of this the judge charged them: "That if the jury believe that W. B. Hinson, being much involved in debt, conveyed to his son-in-law J. L. Green the land in dispute at much less than its value, and the said son-in-law was himself insolvent at that time, and secured the purchase-money by executing his individual note, which has not been paid, and without any further security, then the law presumes the said deed to be fraudulent, and it is incumbent upon the defendant to rebut said presumption; for the law looks with suspicion upon such transactions between near relatives."

The rule laid down by Justice Boyden in *Reiger v. Davis*,

67 N. C. 189, was, that when a debtor much embarrassed conveys property of much value to a near relative, and the transaction is secret, and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent; but when these relatives are made witnesses in the cause, and depose to the fairness and *bona fides* of the transaction, and that in fact there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence may satisfy them.

In *Brown v. Mitchell*, 102 N. C. 372, it is said that in *Reiger v. Davis*, 67 N. C. 189, the court intended only to lay down a rule of evidence, applicable in all cases, whether an issue of fraud is involved or not, that "where effective proofs are in the power of a party who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him."

The language used by Justice Boyden is not correctly reproduced in the *syllabus* that seems to have led to an incorrect inference in *Tredwell v. Graham*, 88 N. C. 208. But in any view of the case, it is only after the relatives who were present make some explanation which, if believed, inspires confidence in their good faith, and shows that they had no reason or purpose to conceal any of the circumstances attending the transaction or the motives leading to it, that the presumption is rebutted, and the inadequacy of consideration and the failure to summon others to witness what occurred in the family dwindles in importance from the basis of presumption to mere badges of fraud. Green, when forced as an unwilling witness to testify, did not repel the presumption of a fraudulent intent by showing that there was no purpose to conceal the fact that the conveyance had been made, and that in fact there was no intention, so far as he knew, on the part of Hinson, to defraud creditors. The explanation made by him is couched in very well guarded language. He testified, on cross-examination, that there was "no understanding between him and Hinson that he was to take the deed to the land in dispute for the purpose of keeping off Hinson's creditors," and he did not say that the price was equal to the real value of the land, but was as much as it was worth with the cloud of litigation as to the title hanging over it. He assigned no reason for postponing the registration of the deed, nor did he state that it was the positive purpose of his father-in-law to exact

and of himself to pay the consideration evidenced by the note. He does not state why it was that the recited consideration was three hundred dollars, while the real price was two hundred dollars. In order to repel the presumption of fraud, the explanation, when attempted, should have been so full that, if believed, it would have relieved the transaction of all suspicion, and established the good faith of the parties to it.

The fact that it is exclusively within the power of persons so nearly related as the defendant and his father-in-law, Hinson, to explain every suspicious circumstance, if they did act in good faith, and the neglect to do so voluntarily, or the failure of one of the parties, when he was forced to go upon the stand, to throw light upon it, so as to fully establish, if their explanations were credited, the *bona fides* of the transaction, is to be considered as due to inability to show that their conduct was consistent with an honest purpose. The presumption arises rather from the peculiar knowledge on the part of parties to a deed of facts that would either confirm or remove suspicion raised by circumstances in evidence as to the embarrassment of the grantor and his relationship to the grantee and the failure to state or prove what they know, than from any positive testimony as to the persons actually present at the transaction. Badges of fraud are suspicious circumstances that overhang a transaction (such as those we have already mentioned in this case); and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party, as it does in all cases where a party purposely or negligently fails to furnish evidence under his control, and not accessible to his adversary: Wharton on Evidence, secs. 1266-1269. This is consistent with the rules as to the *quantum* and quantity of proof requisite upon issues of fraud heretofore laid down by this court: *Brown v. Mitchell*, 102 N. C. 372; *Harding v. Long*, 103 N. C. 1; 14 Am. St. Rep. 775; *Berry v. Hall*, 105 N. C. 154.

The defendant cannot demand that this court, under a general exception to the charge, should follow him in a search for error in every part of it. We can go no further than to review the portion of the charge substituted for the special instruction asked: *McKinnon v. Morrison*, 104 N. C. 354.

There is no error.

Affirmed.

FRAUD — PLEADING. — In pleading fraud, the facts constituting the fraud must be specifically alleged: *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90, and note; *Bickle v. Irvine*, 9 Mont. 251; *Conant v. Bank*, 121 Ind. 324; *Davis v. Clulfant*, 81 Cal. 627; *Baines v. Mensing*, 75 Tex. 200; *Pforzheimer v. Selkirk*, 71 Mich. 6; *Stewart v. Jack*, 78 Iowa, 155; *Marriner v. Dennison*, 78 Cal. 202; *Clearman v. Cotton*, 66 Miss. 467; *Reed v. Bott*, 100 Mo. 62. Where fraud is not alleged, it cannot be proved; but when alleged, it need not of necessity be proved: *Holcomb v. Noble*, 69 Mich. 396.

DEEDS. — As to what fraud will avoid a deed at law, see note to *McArthur v. Johnson*, 93 Am. Dec. 593; note to *Gant v. Hunsucker*, 55 Am. Dec. 411-414.

WITNESSES — IMPEACHMENT. — For the rule as to the impeachment of a witness who is a party to the action, see note to *Allen v. State*, 73 Am. Dec. 776.

FRAUDULENT CONVEYANCES — INSOLVENCY OF GRANTOR. — The mere fact that a grantor is insolvent does not render a conveyance by him fraudulent and void: *Joiner v. Van Alstyne*, 22 Neb. 172; *Chipman v. Stern*, 89 Ala. 207; *Dollins v. Pollock*, 89 Ala. 352; *Hudock v. Hill*, 75 Tex. 193; *Knowles v. Street*, 87 Ala. 357. An absolute conveyance of a debtor in failing circumstances intended to secure an existing legal indebtedness is not void against other creditors: *National Bank of Peoria v. Jaffray*, 41 Kan. 694. A sale by an embarrassed debtor for the purpose of paying his debts is not void as against those of his debtors who do not participate in the proceeds: *Sweeney v. Conley*, 71 Tex. 543. A creditor may take a mortgage from his debtor to secure his debt, even though the debtor is in failing circumstances; yet the mortgage will become fraudulent as to other creditors, if the mortgagee advances money to the debtor and attempts to secure its repayment in the same transaction: *Gallagher v. Goldfrank*, 75 Tex. 562. A debtor in failing circumstances having conveyed his property to a creditor to satisfy his indebtedness, the burden of proof is upon the grantee to establish a *bona fide* transaction; and when a near relationship exists between the parties, stronger proof is required than between strangers: *Lehman v. Greenhut*, 88 Ala. 478. In conveyances by insolvent debtors, no benefit or secret reservation must exist in their favor, further than such as allowed by law: *McDowell v. Steele*, 87 Ala. 493.

FRAUDULENT CONVEYANCE TO DEFEAT JUDGMENT. — A conveyance of one to defeat a judgment for alimony that may be rendered against him is fraudulent and void: *Pickett v. Garrison*, 76 Iowa, 347; 14 Am. St. Rep. 220, and note.

BADGES OF FRAUD. — As to what are badges of fraud, see note to *Brown v. Mitchell*, 11 Am. St. Rep. 759; *Wise v. Wilds*, 77 Iowa, 586; *Plummer v. Rummel*, 26 Neb. 142; *Webb v. Ingham*, 29 W. Va. 389; *Benne v. Schnocks*, 100 Mo. 251.

HORNE v. SMITH.

[106 NORTH CAROLINA, 322.]

FIXTURES.—SAW-MILL AND ENGINE AND BOILER connected with and used to operate it, all of which are attached to the land in the usual way, pass by deed thereof, unless expressly reserved.

FIXTURES—INTENT OF VENDOR TO VARY DEED.—As between vendor and vendee, articles of personalty affixed to the freehold pass by deed to the latter, and the intent of a vendor in placing a saw-mill, engine, and boiler upon land which he subsequently conveys is not competent to vary the terms of the deed.

PRACTICE ON APPEAL.—The appellee may serve a counter-case in lieu of filing specific exceptions to appellant's statement of the case on appeal.

ACTION to try title to a saw-mill, engine, and boiler. Judgment for defendants, and plaintiff appeals.

J. B. Batchelor and S. G. Ryan, for the appellant.

C. M. Busbee and W. W. Fuller, for the respondents.

CLARK, J. The plaintiff bought the engine, boiler, and saw-mill under an execution against C. J. Green. C. J. Green had executed, prior to said judgment and execution, a deed, in trust, to the tract of land upon which the said engine, boiler, and saw-mill were located. At the trustee's sale, which was also prior to said execution, the defendants purchased the said tract of land. Neither in the deed from C. J. Green to the trustee, nor from the trustee to the defendants, was there any reservation of, nor any words indicating any intention to reserve, the engine, boiler, and saw-mill from passing by the conveyance of the freehold.

The court instructed the jury: "If there was a two-story building put on the ground in the usual way in an excavation made therefor, and there was a grist-mill put therein, and an engine and boiler in a shed attached to the main building, connected with and used to operate a saw-mill attached to the land in the usual way, and the engine was supplied with water from a pond made for the purpose, then the saw-mill and engine and boilers were fixtures to the land, and the deed of Calvin J. Green conveyed them, and they passed by the sale of the trustee and his deed to the defendants." To this the plaintiff excepted.

There had been much argument about the question of whether the property was a fixture passing with the land by deed, and many authorities read, and in order to explain the matter more fully to the jury, the court went on to say:

"There are instances in which fixtures attached to the land may still remain as personal property. For the encouragement of trade and manufacturing, and for the convenience of business, the law allows tenants, and all persons occupying the land of another by his consent, to erect any building and to attach any machinery as they may think proper, and gives them the right to remove such buildings or machines. But here this relation does not exist. We have here a man owning the land and owning the mill, and the fixtures pass with the land." The plaintiff excepted.

On the argument, much stress was laid on Green's supposed intention to regard the mill and engine as personal property, and the court instructed the jury further:—

"The question of Green's intent is to be governed by the deed, and he, and those claiming under him, are not allowed to show any other intent. There is no exception in the deed." To this plaintiff excepted.

There were numerous exceptions taken on the trial, but they are all substantially embraced in the exceptions to the above instructions.

"It is a well-settled principle of common law that everything which is annexed to the freehold becomes part of the realty. Although when the ownership of the land and of the chattel is vested in the same person, or when the owners of both concur in a common purpose, the presumption that a chattel is made part of the land by being affixed to it may be rebutted, yet the evidence must, as it would seem, be in writing, under the statute of frauds, or else consist of facts and circumstances of a nature to render a writing unnecessary, by giving birth to an equity or an equitable estoppel": *Elwes v. Mawes*, 2 Smith's Lead. Cas. 267, note, and numerous cases there cited.

The witness for plaintiff had testified that the shelter over engine and boiler was "planked up on each side and length, and planked up and down, open for belt to pass to work in the house; house covered with boards two feet long, nailed on," and that saw-mill was put down in usual manner. It was impossible for purchaser of such property to remove it without disturbing the freehold by tearing up the soil, or removing, in part at least, the building erected over the engine and boiler, and becoming a trespasser. The authorities are uniform that property, such as above, affixed and used as described by plaintiff's witnesses, as well as by defendants'.

were fixtures: *Latham v. Blakely*, 70 N. C. 868; *Bond v. Coke*, 71 N. C. 97; *Treadway v. Sharon*, 7 Nev. 87; *Pea v. Pea*, 35 Ind. 387; *Van Ness v. Pacard*, 2 Pet. 137; *Bryan v. Lawrence*, 5 Jones, 337; certainly as between vendor and vendee: *McGreary v. Osborne*, 9 Cal. 119; Tyler on Fixtures, 519.

There are cases, arising generally between landlord and tenant, when the intent with which the articles were affixed to the freehold is a material inquiry. But those cases have no application here. As between landlord and tenant, if it appear that articles of personal property affixed to the freehold were so placed for the better temporary use of the realty, they may be treated as "trade fixtures." The intent with which they were so placed then becomes material: *Western N. C. R. R. Co. v. Deal*, 90 N. C. 110. But as between vendor and vendee, the common law that articles of personalty affixed to the freehold are a part of the realty, and pass by a conveyance of the latter, is enforced in full vigor.

In *Bond v. Coke*, 71 N. C. 97, Bynum, J., says: "The deed, in our case, containing no exception of the gin and press, the legal effect of it is to pass them to the defendant, and no parol evidence to the contrary is admissible. The exception of them at the sale (as there alleged) being an agreement touching the sale of interest in lands, the statute of frauds requires it to be in writing. And even if the agreement reserving the gin and press had been in writing, it could only be set up by a bill in equity to reform the deed, on the ground of accident or mistake in the draughtsman." And in same case: "Personal chattels which have become fixtures are incorporated in and are a part of the land, as much so as a house or tree, until an actual severance; and therefore a deed conveying the land, without excepting therein the fixtures, has the legal effect of passing the gin or press, which are part and parcel of the land."

In *Moore v. Vallentine*, 77 N. C. 188, Pearson, C. J., says: "A steam-engine annexed to the soil, and used as a part of the freehold, becomes a part of the land, and cannot be severed (even by a tenant) except in special cases."

In *Bryan v. Lawrence*, 5 Jones, 337, it is held that rough plank put in a gin-house to spread cotton-seed upon, though not nailed down, passed as a fixture with the land. But it is needless to multiply cases, or go into the nice learning as to what, in dubious cases, are or are not fixtures. Sufficient to say that the articles here, placed and used as they were,

are clearly fixtures. The rules which, notwithstanding that fact, would entitle a tenant to remove them as trade fixtures by showing the intent or purpose with which they are affixed, are not competent, as between vendor and vendee, to vary a deed conveying the land without reserving them. We think, therefore, that the instructions complained of are correct. The plaintiffs, who bought under execution against Green, can have no higher or better right than he had, and he could not be allowed, as against defendants, to show that property so affixed and used with the freehold was not intended by him to be fixtures, nor that he did not intend to include them in the deed, without the allegation of fraud or mistake."

After the jury had retired for their deliberations, and had been out for a long time, the jury sent the officer in charge to the presiding judge to ask him to come to the court-room, and at their bequest he went. It was late at night. The jury asked for further instructions; said they could not agree. The presiding judge inquired if the parties were in court. They were not then. Then the presiding judge inquired for the counsel, and was informed by the officers of the court that they did not know where one of them was to be found, and that the other lived in the city, some distance from the court-house.

The weather was inclement, and the presiding judge desired to relieve the jury, and he did, in the absence of plaintiff and his attorneys, give further instructions, reiterating orally the substance of the instructions already given, about as follows: "If the jury shall find that the engine and boiler and saw-mill were located, in the manner described by the witnesses, on the land of C. J. Green at the time of the execution of the deed in trust to J. A. Long, the title passed from Green to Long, and by Long's deed to the defendants, and in that case they should find for the defendants."

And plaintiff excepts to the charge thus given, and also excepts that it was given in the absence of plaintiff and his counsel.

This charge is but a statement in a succinct form of what had been given before.

As we have said, property so affixed and used as here clearly falls within the rules which constitute a fixture. Not coming within the exception above stated, which might take it out of the rule, this instruction was entirely correct, and might have been given earlier. The exception as to giving

the instruction asked by the jury, in the absence of plaintiff and his counsel, was properly abandoned in this court. The instruction being set out, the court can see that the defendant was not prejudiced. The propriety of taking such a course must always be left largely to the discretion of the presiding judge: *State v. Jones*, 91 N. C. 654. In this case the discretion was in no wise abused. The appellee did not file specific exceptions to appellant's statement of case on appeal, but in lieu thereof served a counter-case. This has been held a compliance with the statute: *State v. Gooch*, 94 N. C. 982. It is very usual practice, and is often the most practicable mode of presenting the appellee's objections.

Judgment affirmed.

FIXTURES, BETWEEN VENDOR AND VENDER. — As between the vendor and vendee of a mill, a steam-boiler and the looms used in the mill as necessary parts of the machinery thereof are fixtures: *Cavis v. Beckford*, 62 N. H. 229; 13 Am. St. Rep. 554; note to *Gray v. Holdship*, 17 Am. Dec. 686-696; note to *Ottumwa Woolen Mill Co. v. Hawley*, 24 Am. Rep. 726-732. In *Long v. Cockern*, 128 Ill. 30, a portable engine and saw-mill were decided not to be fixtures, although the mill was set up on sills attached to stakes driven into the ground, making it stationary, and the engine was sunk into the ground and a shed built over it.

ELLISON AND HARVEY v. SEXTON.

[106 NORTH CAROLINA, 356.]

PARTNERSHIP — NOTICE OF DISSOLUTION. — A partner retiring from the partnership, in order to relieve himself from further liabilities incurred by the firm, must bring actual notice of his retirement, and of the dissolution of the partnership, home to such persons as have been accustomed to deal with it. As to persons who had knowledge of the firm before its dissolution, but had not had dealings with it, general public notice given in any reasonable way will be sufficient.

PARTNERSHIP — NOTICE OF DISSOLUTION. — EVIDENCE TO PROVE SUFFICIENT NOTICE of the retirement of a partner from the partnership must be such as will reasonably warrant the jury in finding that the party to be charged had actual notice, or might, by reasonable diligence, have learned of the dissolution of partnership and retirement of the partner sought to be charged, from the means and opportunity supplied for the purpose of giving notice of the same; and this is generally a mixed question of law and fact, to be submitted to the jury under proper instructions.

PARTNERSHIP — NOTICE OF DISSOLUTION — INSUFFICIENT PUBLICATION. — A single publication of a notice of dissolution of partnership and the retirement of a partner, in a local newspaper, the circulation of which is mainly confined to the city in which the firm does business, is not notice to the general public of the dissolution of the partnership.

ACTION to recover the value of goods sold and delivered to the firm of A. N. Sexton & Co. during the months of August, September, and October, 1884, before which time the plaintiffs, who were merchants in Richmond, Virginia, had had no dealings with the defendant firm.

W. J. Peele, for the plaintiffs.

E. R. Stamps, for the defendants.

MERRIMON, C. J. On the trial, it was "admitted that the defendants, A. N. Sexton and J. A. Sexton, were partners, doing a general grocery business in Raleigh," under the name and style of A. N. Sexton & Co.; that they did business during the year 1883 and part of the year 1884; the partnership was dissolved about May of the latter year. The business was continued by the defendant A. N. Sexton, under the firm name, until his failure, a year or two afterwards. The evidence tended to prove that the firm was well known in the city of Raleigh, and elsewhere; that it had been reported through Bradstreet's Mercantile Agency; that business people, many of them, saw such report and consulted such agency; that it reported J. A. Sexton as the solvent member of the firm, etc. The evidence further went to show that the firm gave notice to persons and firms with whom it had dealt of its dissolution. The plaintiffs had not dealt with it before that time. Afterward, in the months of August, October, and December of the year 1884, the plaintiffs, merchants of Richmond, Virginia, sold to "A. N. Sexton & Co." whisky of the value of \$489.34, and this action is brought to recover the sum due for the same, and particularly to charge the defendant J. A. Sexton therewith, as a member of the firm named, upon the ground that he allowed his co-defendant to use the firm name after the formal dissolution of the partnership, and that no notice of such dissolution was given to the business public. There was evidence on the trial tending to prove that the plaintiffs, through their business agent, had express notice of such dissolution of the partnership, and that the defendant J. A. Sexton had gone out of the business, and was not of the firm, or in any way connected with the business as continued. There was also evidence to the contrary. There was no evidence on the trial of general notice of the dissolution of the partnership, except the following: "I am proprietor of the *Evening Visitor*; it has a large local circulation; not large out

of the state; I published the notice of dissolution at the request of one of the Sextons; I think it was the doctor; he told me to publish one time; I told him it should be published thirty days; there was only one insertion of the notice; he did not direct publication any more than one time."

On the subject of notice, the court instructed the jury as follows: "If one party sells out his interest in the copartnership, and withdraws therefrom, this is a dissolution, and the actual copartnership is at an end. But as to all other persons, a constructive partnership continues until proper notice of such dissolution is given. General notice is sufficient as to the public in general; but as to such as have had dealings, actual notice must be given. The plaintiffs never had any dealings with the defendants prior to the alleged dissolution. And so the law did not require any of the defendants to give to the plaintiffs any actual notice. Notice of dissolution may be made, so far as the general public is concerned, by publication in a newspaper published in the town where the firm does business, for a sufficient time to give notice to those with whom the partners dealt. Of course such notice must be given in a public manner, in a newspaper of general circulation. The law would not allow a mere pretense to the mode of publication. It must be a fair, open notice, so that it may be read of all concerned. The law requires good faith in all dealings, and will not allow any person, by any false light, to mislead another in matters of contract, and escape responsibility. If a man knows that he is held out as a partner, and if he allows his name to be used on a public sign over a place of business, and persons induced by such appearance extend credit, he who allows himself to be thus held out to the public would be estopped to deny that he was a partner, and would be held to be a partner by construction of law."

The plaintiffs requested the court to instruct the jury that the notice given in the newspaper mentioned was not notice; certainly, not sufficient notice. The court did not do so, otherwise than as above stated. The plaintiffs excepted, and appealed.

Evidence was produced on the trial to prove that the plaintiffs had knowledge of the business partnership of A. N. Sexton & Co., and that the defendant J. A. Sexton was the solvent member thereof before its dissolution, in May, 1884. In the absence of knowledge or notice of such dissolution, and the retirement of J. A. Sexton from the firm and its business, and

as the other partner continued the business under the firm name, the plaintiffs might reasonably, and they had the right to, infer that the firm continued to exist, and that the retiring member of it was still a member thereof, and responsible for such debts and liabilities as the member continuing the business might contract or incur in the course of the business in the name of the firm, and they might safely act upon such inference. Such continued responsibility of the firm, including that of the retiring partner, rests upon the ground of the negligence of the partners, in that they left the business community in ignorance of the dissolution of the partnership, and thus left strangers to conclude that it continued, and to have faith and confidence in the partnership named. It rests upon the just principle that if one of two persons must suffer by reason of a credit given, he whose act or negligence misled the confidence of the other, and who has been the cause of such credit by his misrepresentation, his negligence or fraud, ought to suffer, and not the other. It contravenes reason and common justice that a person in no default shall suffer loss by reason of the laches and misconduct of another, when one or the other must suffer loss: Gould on Partnership, 248; Collyer on Partnership, sec. 530; Story on Partnership, sec. 160.

A partner retiring from the partnership, in order to relieve himself from further liabilities incurred of the firm, must bring actual notice of such retirement, and of the dissolution of the partnership, home to such persons as have been accustomed to deal with it. It is not essential that such notice shall be given in any particular form; it may be express, or it may be implied from circumstances. It must appear, however, with reasonable certainty, that such persons in some way received actual notice. This is so, because established business relations might lead such parties more readily to give the firm credit. Moreover, they are known to the firm, and may be readily, in some proper way, notified: *Scheiffelin v. Stevens*, 1 Winst. 106.

As to persons who had knowledge of the firm before its dissolution, but had not had dealings with it, general public notice, given in any reasonable way, will be sufficient. Evidence of facts and circumstances that in their nature, connection, and bearings put the public or particular parties claiming or complaining on notice may be submitted to the jury, with proper instructions from the court, to prove the required notice.

Such notice given in a regular newspaper of general circulation, published in the city, town, or county where the partnership business is carried on, is the usual method of giving information, and may, in ordinary cases, be sufficient, when continued for a reasonable length of time,—this depending somewhat upon the nature, extent, and place of the business. It is said that the sufficiency of notice thus given might be questioned in many cases, unless it shall be shown that the person entitled to notice was in the habit of reading the paper. General public notice thus given would not be actual and express notice, but it would be presumptive in its nature, and from it the jury might, under proper instructions from the court, conclude such persons as had not had previous dealings with the firm: *Collyer on Partnership*, sec. 532; *Story on Partnership*, sec. 161; *Lovejoy v. Spafford*, 93 U S 430.

It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner; but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice; that the party to be charged with it actually had it, or might, by reasonable diligence, have learned of the dissolution of partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally, the reasonableness of the notice will be a mixed question of law and fact to be submitted to the jury, under proper instructions of the court, as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution. As said above, ordinarily, notice fairly given in a newspaper generally circulated abroad, and particularly among the business people of the town or city where the partnership carried on its business, would be sufficient as to all persons who had not had previous dealings with the partnership. It is better and safer to give notice in that way, although it might be given in other ways. This would afford business men reasonable opportunity to learn of the dissolution, and in the course of business, the matter would be generally known and more or less spoken of to business men from every direction. But such publication must be fair and reasonable as to its terms and the number of times it shall be made.

If the facts are found or ascertained, the reasonableness and sufficiency of the notice may be a question of law for the court.

The court must determine that there is, or is not, evidence sufficient to go to the jury to prove notice.

In the present case there was evidence of actual notice to plaintiffs of the retirement of the defendant J. A. Sexton from the partnership in question, but there was evidence to the contrary. Whether there was reasonable and sufficient general public notice of it becomes a material question. We cannot hesitate to decide that there was not sufficient evidence of it to go to the jury. Such notice was published in a daily paper one time, the circulation of which was confined mainly to the city of Raleigh. It does not appear that any one actually saw or read it, whether it appeared in an obscure place in the paper, or what space it occupied. Nothing appeared going to show that the plaintiffs saw the paper, or that they ever heard of the notice in any way. It was shadowy, entirely too slender, of itself, to serve any practical or just purpose, especially as the business was continued in the firm name. The court should, in the proper connection, have told the jury that there was no evidence before them of general notice; and as he failed to do so, there is error. The plaintiffs are entitled to a new trial, and we so adjudge.

PARTNERSHIP — DISSOLUTION, NOTICE OF. — As to what notice of a dissolution of a partnership is sufficient, and its effect, both as to customers of the partnership and also with respect to those who are not customers, see note to *Prentiss v. Sinclair*, 26 Am. Dec. 290-293.

BAIN v. RICHMOND AND DANVILLE RAILROAD CO.

[105 NORTH CAROLINA, 363.]

TAXATION. — ROLLING STOCK OF FOREIGN RAILROAD COMPANY passing across the state for the purpose of interstate commerce is not subject to taxation in that state.

Theodore F. Davidson, attorney-general, and *R. H. Battle*, for the appellant.

C. M. Busbee, for the respondent.

MERRIMON, C. J. The plaintiff is the treasurer of North Carolina. The defendant is a corporation of the state of Virginia, and has a lease of the railroad of the North Carolina Railroad Company, a corporation of this state, and it does the business of transportation in, through, and across this state from the state of Virginia and other states to the state of South Carolina and other states.

The purpose of this action is to recover the sum of \$350 as taxes alleged to be due this state from the defendant, and for costs.

The following are the facts found by the court below, and its judgment thereupon:—

“1. The Richmond and Danville Railroad Company was, on June 1, 1888, the owner of seventeen thousand five hundred dollars' worth of rolling stock, to wit, four 'switching-engines' and 'one coach,' which were, on June 1, 1888, used exclusively in North Carolina, but owned in Virginia, and which the company may at any time recall.

“2. Upon all the rolling stock of the Richmond and Danville Railroad Company, the company is assessed for taxation, and does pay taxes, in Virginia.

“3. The rolling stock of the North Carolina Railroad Company is used exclusively in North Carolina, and upon all this rolling stock, of the assessed value of one hundred and twenty-five thousand dollars, taxes are assessed and paid in North Carolina by the Richmond and Danville Railroad Company, the lessee.

“4. The board of appraisers and assessors of the North Carolina railroad made the assessment, as set out as an exhibit to complaint, of one hundred and seventy-five thousand dollars upon the rolling stock of the Richmond and Danville Railroad Company in use in North Carolina, on June 1, 1888.

“5. On June 1, 1888, there was in use on the North Carolina railroad, leased by the Richmond and Danville railroad, in North Carolina, rolling stock passing through the state to the value of one hundred and seventy-five thousand dollars. Such rolling stock was owned by the Richmond and Danville Railroad Company, and the trains in which said rolling stock was used were made up outside of North Carolina, and went on through to the state of South Carolina.

“Upon this state of facts, his honor ruled that the defendant company was liable to pay taxes to the state upon seventeen thousand five hundred dollars (on the engines and coaches used exclusively in North Carolina), and was not liable to pay upon one hundred and fifty-seven thousand five hundred dollars, the remainder, used in interstate commerce.

“Therefore, it is adjudged that the plaintiff recover of the defendant the sum of \$350, and interest from July 1, 1888, and costs.”

The power and right of the state to tax property of non-

residents, whether these be natural or artificial persons, having its *situs* within the state for the purposes of business, convenience, or pleasure of the owners thereof, or others, is too well settled to admit of serious question. This important right of the state is surely founded upon the just ground that such property has the protection, advantage, and benefit of the laws of the state, and it ought, on that account, to be required to contribute as taxes its fair share towards the support of the government whose benefits extend to it, not merely casually, but regularly and continuously, while it continues to be so located, as does other like property of residents of the state. Upon principles of common justice, every property owner should contribute to the support of the government that protects and renders his property valuable and useful, his fair proportion of money as a consideration therefor, unless, for some proper cause, he is excused from doing so: *Albany v. Powell*, 2 Jones Eq. 51; *Redmond v. Commissioners*, 87 N. C. 122, and numerous cases there cited; *Worth v. Commissioners*, 90 N. C. 409; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Thomson v. Union Pacific R. R. Co.*, 9 Wall. 579; *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Western Union Tel. Co. v. Attorney-General*, 125 U. S. 530; *Leloup v. Port of Mobile*, 127 U. S. 640.

If the state were absolutely sovereign in all respects, it might tax property coming into it temporarily from another state for the purpose of trade, or property passing across its territory from one state to another or other states in the course of trade, travel, and commerce. It might tax such trade and travel, in the discretion of its legislature. But as a member and constituent part of the federal Union, it does not possess unlimited powers of taxation as to all property, matters, and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by the constitution of the Union, and it is its and their duty to observe, administer, and enforce its provisions in proper cases and connections, as much so as its own constitution and laws. Indeed, the constitution of the United States is a part of the organic law of this state, and in principle and theory there is not, and cannot be, any conflict between the constitution and laws of the United States and the same of this state. If conflict in fact exists in any respect, as unhappily is sometimes the case, this is so because those who determine what the law is, administer and enforce it, are

ignorant of or misapprehend its true meaning and application, or willfully disregard and disobey it.

A leading and very important purpose of the federal Union was, to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly for the present purpose, between and among the several states comprising it. To this end it is provided in its constitution, article 1, section 3, part 3, that "the Congress shall have power . . . to regulate commerce with foreign nations and among the several states, and with the Indian tribes." The power thus conferred is indefinite as to its scope, and capable of very latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects, but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights, and convenience of the states. Very certainly the provision implies that Congress shall regulate such commerce, and the state shall not; that Congress shall do so effectually, in such way and by such means as will secure, promote, and encourage the same, and that the states shall not, if disposed to do so, interfere with, destroy, hinder, or delay the same, or divert it in any way by any legal constraint for their own advantage, otherwise than to a very limited extent, as allowed by the constitution.

Hence it is settled that a state cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means, and appliances employed and used in connection therewith, coming into that state from another temporarily, however frequently, and returning to such other state; nor can it tax such commerce, or such incidents thereto, passing across it from another or other states to another or other states, however often this may be done. And the reason is, that to so tax such commerce and the incidents thereto, including such means of transportation, would tend directly, and have the effect in a greater or less degree and like extent, to interfere with the freedom of commerce among and between the people of the states. It would have the certain effect to embarrass, hinder, and delay the free course of such trade. If a state could thus tax such commerce at all, it might, in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders,

and, in possible cases, prevent it from passing freely into other states. Moreover, if one state might tax it, every state through which it passes might do so likewise, and thus the power of Congress to regulate interstate trade and commerce would be nugatory and a sheer mockery. It is clear that a state has no such power, and the supreme court of the United States has authoritatively so decided, directly and in effect, in many cases: *Hayes v. Pacific M. Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, and numerous cases there cited; *Pickard v. Pullman S. C. Co.*, 117 U. S. 34; *Leloup v. Port of Mobile*, 127 U. S. 640.

The statute (Acts 1887, c. 137, secs. 44-51), properly interpreted, does not, and was not intended to, embrace and to tax the property of the defendant put in question by this appeal. It had reference to and embraced property of corporations, whether resident or not, whose property was situated, had a *situs*, in this state, and was thus subject to be taxed. But the property in question was not, in a legal sense, located — situated — in this state; it had no *situs* here. It was the property of a non-resident corporation, employed and used by it constantly for the purposes of transportation in the course of the conduct of interstate trade and commerce coming into and passing across this state from another and other states to and into another and other states. It was not stationary, but constantly *in transitu* from one state to another. The mere fact that property of the defendant of the value mentioned was continuously within the state did not give it a *situs* here; it was continually changing, and *in transitu* in the course of interstate commerce. It was so continuously in the state, day and night, because of the great volume of trade and travel passing over the defendant's road into and across this state going to other states. It is true, as suggested on the argument, that such property receives protection from this state, and has benefit of its laws; but nevertheless it is not the subject of taxation, because the constitution of the United States will not, as we have seen, allow it to be made such subject. Judgment affirmed.

RAILROADS — TAXATION. — As to where rolling stock of railroad companies is to be taxed, see note to *City of Albany v. Meekin*, 56 Am. Dec. 535. Sleeping-cars hired and run by a railroad company in the state of Colorado, from a company in the state of Illinois having no place of business in Colorado, are taxable in the latter state: *Carlisle v. Pullman P. Car Co.*, 8 Col. 320; 54 Am. Rep. 553.

NORRIS v. STEWART'S HEIRS.

[105 NORTH CAROLINA, 455.]

WITNESS—COMPETENCY. — WIDOW, though interested in the result of the action, is competent to testify to matters relating to her deceased husband's estate, except as to transactions and communications between themselves.

WITNESS—COMPETENCY—WAIVER OF OBJECTION TO. — Where the wife of a deceased husband is proceeding to testify to inhibited transactions and communications between themselves, objection should be made at the time, or it will be deemed to have been waived.

EVIDENCE OF GOOD CHARACTER IS INADMISSIBLE BY WAY OF DEFENSE in civil actions in which a party is charged with specific fraud.

EVIDENCE OF GOOD CHARACTER IS NOT ADMISSIBLE IN CIVIL ACTIONS by way of defense, unless the nature of the action involves the general character of the party, or goes directly to it.

ACTION by the heir of Amos Johnson, deceased, to set aside a deed executed by the latter to N. S. Stewart, the ancestor of the defendants, on the ground of fraud and undue influence. At the trial, Rachel Johnson, wife of said Amos, was introduced as a witness on behalf of plaintiffs, and testified, over objection, to transactions and communications other than those between herself and her deceased husband, and afterwards, without objection, testified to such transactions and communications. She then testified that her former husband was a drinking man, and that said Stewart could influence him. Other evidence tended to show that Stewart was the agent of Johnson. Defendants introduced evidence to impeach that of Rachel Johnson, and to show that she lived on bad terms with her deceased husband, and that she had been at one time a woman of bad repute. An offer was also made on the part of defendants to prove the good character of Stewart. This evidence was objected to, the objection sustained, and defendants excepted. Judgment for plaintiffs, and defendants appeal.

F. P. Jones, for the appellants.

R. P. Buxton, for the respondents.

SHEPHERD, J. 1. When Rachel Johnson was introduced in behalf of the plaintiffs, her competency was objected to by the defendants. The court overruled the objection, and the defendants excepted. Conceding that she was interested in the result of the action, it is too plain for argument that she was a competent witness, the only restriction being that she

could not testify as to any transaction or communication between herself and her deceased husband: Code, sec. 590. Being a competent witness, the general objection was properly overruled, and she was permitted to testify to many matters which were not inhibited by the above section of the Code. When she was proceeding to testify to such inhibited transactions and communications, it was the duty of the defendants to interpose their objections; and as they failed to do so, they must be deemed to have waived them.

2. The exception to the refusal of his honor to admit the testimony as to the good character of Stewart is likewise without merit.

The action is brought by the heir at law of Amos Johnson, for the purpose of setting aside a deed executed by him to Neill S. Stewart, the ancestor of the defendants, on the ground that said Stewart obtained the execution of the said conveyance by fraud and undue influence. There was testimony tending to sustain the allegations of the plaintiffs, and the testimony as to character was offered to contradict such testimony, and for "general purposes."

As a general rule, evidence of good general character is inadmissible, by way of defense, in civil actions in which a party is charged with a specific fraud, because the character of every transaction must be ascertained from its own circumstances, and not from the character of the parties: *Fowler v. Aetna F. Ins. Co.*, 6 Cow. 673; 16 Am. Dec. 460.

Such evidence is not admitted in civil actions unless the nature of the action involves the general character of the party, or goes directly to affect it: 1 Greenl. Ev., sec. 54; 1 Phill. Ev., 10th ed., 757; *Church v. Drummond*, 7 Ind. 17; *Gutzwiller v. Lackman*, 23 Mo. 168; *Porter v. Seiler*, 23 Pa. St. 424; 62 Am Dec. 341; *Ward v. Herndon*, 5 Port. 382. In such a case, no matter how serious a moral delinquency may be involved in a fact, and how much the establishment of that fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact: *Smets v. Plunket*, 1 Strob. 372.

In civil cases, where the question of character is directly in issue, and material as to the amount of damages, as in seduction or slander, evidence of character is admitted: *Wright v. McKee*, 37 Vt. 161.

The foregoing authorities, taken from the able and discriminating note of Mr. Freeman to the case of *O'Bryan v. O'Bryan*,

53 Am Dec. 133, are entirely sustained by the decisions of this and other courts, both in England and America. See *Heileg v. Dumas*, 65 N. C. 214; *McRae v. Lilly*, 1 Ired. 118.

It is contended, however, by the defendant, that Stewart's character was put in issue. This is a misconception. The true rule is laid down by Tilghman, C. J., in *Anderson v. Long*, 10 Serg. & R. 61: "The plaintiff's counsel say that the character of James Anderson was put in issue here, because the defendant accused him of fraud. But that is not putting character in issue. By the same mode of reasoning, the defendant's character is put in issue in every action of *assumpsit* because the declaration charges him with an intent to deceive and defraud the plaintiff. Indeed, in most of the controversies in courts of justice, it may be said, with some degree of truth, that character is in question, because an honest man would not act with injustice. But putting character in issue is a technical expression, and confined to certain actions, from the nature of which the character of the parties, or some of them, is of particular importance. Such is the action brought by one man against another for seducing his wife and having criminal connection with her. There the injury done to the plaintiff consists mainly in the good conduct of his wife before her seduction, and therefore the defendant is permitted to show that she is unchaste. So in an action for slander, the plaintiff in his declaration asserts his own good character, and avers the intent of the defendant to rob him of it. He puts his character in issue, therefore, and the defendant is at liberty to impeach it. But it has never been supposed that character is put in issue merely by the charge of fraud made by one party against the other."

Thus where, in ejectment, the title depended upon the question whether a party had committed a fraud in procuring a will, he was not allowed to show his good character: Bull. N. P. 296. So where an information was filed against a defendant under the excise laws to recover a penalty for his keeping false weights, his good character could not be brought into the evidence: 2 Bos. & P. 532.

In *Gough v. St. John*, 16 Wend. 646, it was held that evidence of the good character of the defendant for honesty and fairness was not admissible in an action on the case for fraudulent representation. Coman, J., said that it was agreed "that this action charges the obtaining of checks by false pretenses, which is a felony by the revised statutes. I answer,

as did Doggett, J., in *Humphrey v. Humphrey*, 'Causes charging cruelty, gross fraud, and even forgery, are often agitated in suits by individuals, and the result not unfrequently affects the property and reputation of the party deeply; yet no individual has been permitted to attempt to repel the proof by showing a good reputation.' "

In *Woodruff v. Whittlesey*, Kirby, 60, the issue was whether there was a fraudulent transfer of a heifer, and the court excluded testimony as to the good character of the parties to the alleged fraudulent conveyance. So where the defendant was charged with burning wheat belonging to the plaintiff, evidence of good character was held inadmissible: *Barton v. Thompson*, 56 Iowa, 571; 41 Am. Rep. 119.

These cases serve to illustrate what is meant by putting character in issue, and show very conclusively that our case does not fall within the rule which permits the introduction of the testimony offered by the defendants.

Affirmed.

EVIDENCE OF CHARACTER IN CIVIL CASES. — Evidence of general good character is inadmissible, by way of defense, in a civil case in which a party is charged with a specific fraud: *Simpson v. Westenberger*, 28 Kan. 756; 42 Am. Rep. 195, and note; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; 56 Am. Rep. 870; *Barton v. Thompson*, 56 Iowa, 571; 41 Am. Rep. 119, and note. Evidence of character is not admissible except when the character of one of the parties is in issue: *Porter v. Seiler*, 23 Pa. St. 424; 62 Am. Dec. 341.

DOWD v. WATSON.

[105 NORTH CAROLINA, 476.]

EVIDENCE TO REBUT PRESUMPTION OF DEATH. — The presumption of death, arising from the absence of a person for seven years without having been heard from, may be rebutted by evidence sufficient to satisfy the jury that he has been heard from within that time. It is not necessary to produce persons who have seen him, or to produce letters received from him within that period.

C. Manly, for the appellant.

H. R. Bryan and W. W. Clark, for the respondents.

CLARK, J. There was no direct proof of death, and plaintiffs relied upon the presumption of death, from absence for more than seven years without being heard from. This is merely a presumption of fact, and may be rebutted. If any one had heard from the party whose death is alleged, within

seven years, the jury should have been allowed to consider evidence of that fact. "There is no rule of law which confines such intelligence to any particular class of persons. It is not a question of pedigree": *Flynn v. Coffee*, 12 Allen, 133; *Abbott on Trial Evidence*, 76. In *Moore v. Parker*, 12 Ired. 123, it was held that a report that a person who had been absent seven years was alive, which report, on investigation, proved to be unfounded, would not rebut the presumption of death. The decision is based not on the ground that the report was incompetent, but that diligent inquiry had been made and showed it to be untrue.

The case on appeal states: "For the purpose of rebutting the presumption of death of E. M. Andrews, the defendant offered evidence to the effect that E. M. Andrews was a single man; that he had no near relation in Craven County, or in North Carolina, except his aforesaid brother; that in 1867 or 1868 he joined the United States army, and left the county with his command. Defendant and one Israel Simmons became witnesses. Defendant proposed to prove by them 'that the general report among his friends and those who knew him before he left home was, that E. M. Andrews was living and in the United States army.' Defendant also proposed to prove by said Simmons that he had, a short time since, seen and conversed with a man from Texas, and that he was informed by him that E. M. Andrews was alive, in Texas; that he had seen him there a short time before. The court held that there was not sufficient rebutting testimony to be submitted to the jury, and instructed the jury to respond to the issue affirmatively if they believed the evidence. The court excluded the testimony above offered. To such exclusion, and to the instruction of the court to return a verdict in favor of the plaintiffs, the defendant excepted."

We think the court erred. The presumption of death arises from the absence of a person for seven years without having been heard from. To rebut the presumption, it is not necessary to produce the testimony of persons who have seen him, or to produce letters from him. It is sufficient to produce evidence which shall satisfy the jury that he has been heard from within the seven years. Such evidence is usually and almost necessarily "hearsay." It may be that if the evidence here offered had been admitted, the cross-examination would have shown it to have been mere vague rumor, and if so, unworthy of credit; but if there was such report and intelligence as to

the absent man among his friends and former acquaintances, as was offered to be shown, the weight to be given it was for the jury.

Error.

DEATH, PRESUMPTION AS TO.—As to when and under what circumstances the presumption of death arises, see note to *Sprigg v. Moale*, 92 Am. Dec. 704-708. To rebut the presumption of death, the declarations of the supposed dead man's deceased wife that she received a letter from him after his departure is admissible: *Norris v. Edwards*, 90 N. C. 382; 47 Am. Rep. 526; compare note to *Hoyt v. Newbold*, 46 Am. Rep. 761-772. And the question as to how much evidence is necessary to outweigh the presumption of death is for the jury to determine: *Tisdale v. Connecticut M. L. I. Co.*, 26 Iowa, 170; 96 Am. Dec. 136.

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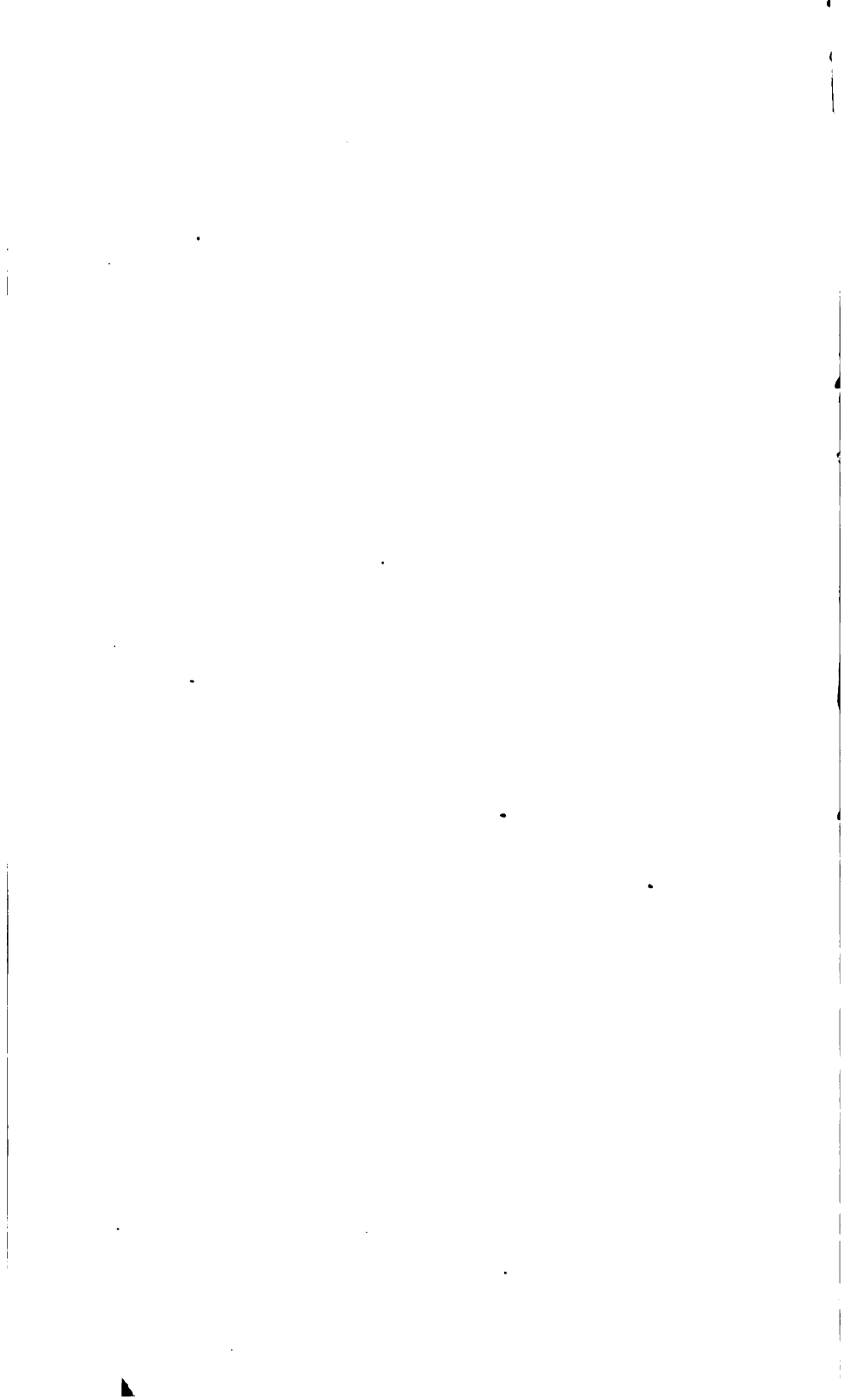
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ADVERSE POSSESSION.

1. POSSESSION HELD UNDER LEASE OR LICENSE IS NOT ADVERSE, and cannot be of any avail as a defense under the statute of limitations. *Hankin v. McManus*, 533.
2. POSSESSION UP TO GIVEN LINE, WHEN ADVERSE. — Where adjoining proprietors hold possession up to a given line, but without claiming or intending to claim beyond the true line, wherever that may turn out to be, the possession will not be adverse to the true owner; but where one takes and holds exclusive possession up to a wall or fence, and claims to be the owner up to that wall or fence, his possession will be adverse. *Id.*

See HUSBAND AND WIFE, 2.

AGENCY.

1. DEATH OF PRINCIPAL, WHEN DOES NOT REVOKE POWER. — Power of attorney which purports to be irrevocable, and which authorizes the agent to draw all moneys which shall become due the principal on a specified contract, and which was made pursuant to an understanding with the agent to furnish, from time to time, all moneys necessary to carry on

the work under such contract until it was completed, gives the agent an interest in the subject-matter, and therefore is not revoked by the death of the principal, where it was preceded by an assignment of the same moneys which the power of attorney authorized the agent to collect. *Norton v. Whitehead*, 172.

2. **PRINCIPAL RESPONSIBLE FOR ACTS OF AGENT DONE WITHIN SCOPE OF HIS AUTHORITY.** — A principal is responsible for the acts of his agent, when they have been done within the scope of his authority; and this liability will not be enlarged. *Kircher v. Conrad*, 731.
 3. **SALE — REPRESENTATION BY AGENT AS EVIDENCE — ESTOPPEL.** — Oral representations of an agent, in making a sale of lumber, that his principal will furnish Star Poplar "bone dry," are admissible in an action for the price, and are binding on the principal as part of the contract, although such contract, as evidenced by the correspondence between the principal and purchaser, only calls for Star Poplar, which might be either wet or dry. The purchaser is not estopped from denying that his letter ordering Star Poplar, omitting to say that it must be dry, expressed the whole contract, the agent having represented that that grade of lumber was always dry. *St. Louis Refrigerator etc. Co. v. Vinton Washing Machine Co.*, 366.
 4. **AUTHORITY TO SELL, CONSTRUCTION OF.** — Authority to sell a parcel of real estate for a sum specified to be paid as follows, — a designated sum on a first mortgage, another sum on a second mortgage, and the balance to the owner on a day named, — does not authorize a sale whereby the purchaser agrees to assume the mortgages, and to pay the balance at the time mentioned in the contract, because it leaves the vendor personally liable on the mortgage debts. *Schultz v. Griffin*, 825.
 5. **WARRANTY OF TITLE TO REAL ESTATE, POWER OF AGENT TO MAKE.** — A power without restriction to sell and convey real estate gives authority to the agent to contract for a conveyance with general warranty binding on the principal, where under the circumstances this is a common and usual mode of assurance. *Id.*
- See **BROKERS**; **CORPORATIONS**, 22; **INSURANCE**, 1; **MALICIOUS PROSECUTION**, 2, 3; **MASTER AND SERVANT**; **SALES**, 5.

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APPEAL AND ERROR.

1. **FINDINGS OF FACT BY TRIAL COURT BINDING ON APPELLATE COURT WHEN.** — In an action at law, tried by the court without the aid of a jury, the finding of facts by the trial judge is as binding upon the appellate court as a finding of facts by a jury; nor does it make any difference that the evidence was heard before one judge, and tried on a transcript thereof before another. *Handlan v. McManus*, 533.

2. **DEMURRER TO EVIDENCE, PRACTICE OF SUPREME COURT ON.** — When a demurrer to the plaintiff's evidence is made and overruled, and the defendant puts in his evidence, the supreme court in reviewing the ruling will do so in the light of all the evidence. If upon all the evidence, no matter by whom or when offered, there is a case to go to the jury, the ruling will not be reversed, though the demurrer to the plaintiff's evidence should have been sustained as the case stood when it was interposed. *Weber v. Kansas City Cable Ry Co.*, 541.
3. **EVERY TRANSCRIPT ON APPEAL SHOULD CONTAIN ALL THE MATTERS ON** which the cause is to be determined, and it is not proper for counsel to make another transcript a part of the case by stipulating that the evidence and findings in such other transcript, so far as pertinent, shall be considered in the case on appeal. *Spangler v. San Francisco*, 158.
4. **CONSTRUCTION OF RULE OF COURT.** — The rule of the supreme court of California applicable to proceedings for writs of prohibition and the like writs requiring, when a judge or public officer is named as respondent, that the petition shall state the names of the real parties in interest, and that a copy of the petition and writ shall be served upon such parties, does not require that they be made formal parties to the proceedings by being named as defendants, but only that their names shall be disclosed by the petition. A failure to serve them with a copy of the petition and writ does not abate the whole proceeding, but, at most, requires its postponement until they can be served and have a reasonable time to appear. *Haveynier v. Superior Court*, 192.
5. **PRACTICE ON APPEAL.** — The appellee may serve a counter-case in lieu of filing specific exceptions to appellant's statement of the case on appeal. *Horne v. Smith*, 903.

See CORPORATIONS, 16; NEGLIGENCE, 4; TRIAL, 2

ARREST.

1. **ARREST, WITHOUT WARRANT, FOR MISDEMEANOR,** by an officer of the peace who does not see the offense committed, is illegal; nor will suspicion that the party has committed a misdemeanor on a previous occasion justify an arrest without warrant. *Pinkerton v. Verberg*, 473.
2. **ARREST WITHOUT WARRANT — STREET-WALKER.** — Although a conservator of the peace may arrest, without warrant, a street-walker or common prostitute who is on the street plying her vocation, still a mere suspicion that she is doing so, where there is no act indicating that she is there for that purpose, will not justify such arrest, nor render it legal. *Id.*
3. **ARREST — NECESSITY OF READING WARRANT.** — An officer seeking to execute a valid warrant of arrest need not announce nor explain its contents to the accused, when he has knowledge of the charge contained therein. *King v. State*, 89.
4. **ARREST WITHOUT WARRANT.** — A policeman or town marshal may, without warrant, arrest one who commits a breach of the peace in his presence, or who, by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit such breach. *Martin v. State*, 91.
5. **ARREST WITHOUT WARRANT — RIGHT TO SUMMON BY-STANDERS.** — An officer having the right to make an arrest without warrant may summon by-standers to assist him, when necessary to make the arrest, and such summons clothes them with authority to render him all needed assistance. *Id.*

6. ARREST WITHOUT WARRANT—PROOF OF SUMMONING OF BY-STANDERS.

—The words spoken by an officer to summons by-standers to assist him in making an arrest without warrant may be given in evidence against any one, whenever the fact of their being summoned becomes a material inquiry. *Id.*

See CRIMINAL LAW, 24, 25.

ASSAULT.

See CRIMINAL LAW, 2-5, 17.

ASSIGNMENT.

1. **ASSIGNMENT OF MONEYS TO BECOME DUE.**—If one who is performing work under a contract executes an assignment of all moneys due or which may become due him on any work he may perform, and which assignment declares it shall remain in force until all the notes which are due or which are to become due to the assignee are paid, and is supplemented with a power of attorney, purporting to be irrevocable, authorizing the assignee to collect all sums of money which are and shall be due by reason of his performance of the contract, such assignment and power, though the contract contained a clause prohibiting its assignment, operate to transfer to the assignee all moneys necessary to pay notes due to him from the assignor, though executed after the making of the assignment. *Norton v. Whitehead*, 172.

2. **ASSIGNMENT OF CONTRACTS.**—The Civil Code of California removes the restrictions formerly existing upon the power of parties to assign their ordinary contracts, though it does not render all contracts assignable regardless of their nature or effect, nor does it render null any agreement or prohibition the parties themselves may have made on the subject. *La Rue v. Groezinger*, 179.

3. **ASSIGNMENT OF A CONTRACT CANNOT BE MADE WHEN** its nature is such that performance by another would be an essentially different thing from that contracted for. Hence an artist or author contracting to paint a picture or write a book cannot assign such contract so far as to authorize its performance by another. *Id.*

4. **CONTRACT, WHAT ASSIGNABLE.**—Contract by which the owner of a vineyard is given the privilege of selling all the grapes which he may grow for a period of ten years from vines in such vineyard, the grapes to be sound, and to contain twenty-two per cent of saccharine matter, may be assigned by the vineyardist, there being no evidence that vines raised in the same vineyard by one man, containing the specified amount of saccharine matter, would probably be different from grapes raised there by another man. *Id.*

5. **OPTIONAL CONTRACT MAY BE ASSIGNED;** therefore one who has the right, but is under no obligation to sell the growth of his vineyard at a specified price, may assign that right to another, to whom he has transferred the vineyard. *Id.*

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See RECEIVERS, 21, 22.

ASSOCIATIONS.

See VOLUNTARY ASSOCIATIONS.

ASSUMPSIT.

1. **MONEY PAID WITHOUT CONSIDERATION** may be recovered in *assumpsit* under a declaration on the common counts for money had and received. *Ripley v. Case*, 428.
2. **ELECTION TO WAIVE TORT AND SUE IN ASSUMPSIT.** — When wrong-doers have converted but have not sold the property of another, he may waive the tort and proceed upon an implied contract of sale to the wrong-doers. The contract implied in such cases is, that they will pay the value of the property as if it had been sold to them by the owner. *Terry v. Munger*, 803.
3. **THE TITLE OF PROPERTY CONVERTED PASSES TO THE WRONG-DOER** when the owner elects to waive the tort and to sue in *assumpsit* for the value of the property. *Id.*
4. **ELECTION TO WAIVE TORT AND SUE IN ASSUMPSIT PERSONS WHO HAVE BEEN GUILTY, WITH OTHERS, OF CONVERTING PROPERTY** vests the title to such property in the persons so sued, and the plaintiff cannot, if he had knowledge of the facts when he commenced his action, subsequently maintain an action against another person to recover damages against him for the alleged conversion of the same property. *Id.*
5. **JUDGMENT RECORD IS ADMISSIBLE EVIDENCE** in favor of one who was not a party to the former action, if the purpose in offering it in evidence is to show that the plaintiff who is suing for the conversion of his property has elected to waive such conversion, and to sue in *assumpsit* for its value, because, by such election, the plaintiff parted with his title to his property. *Id.*
6. **ELECTION BETWEEN INCONSISTENT RIGHTS AND REMEDIES CANNOT BE RECONSIDERED** even where no injury has been done by the choice, or would result from setting it aside. Hence an election to waive a tort and to sue in *assumpsit* takes effect on the commencement of the action whether it proceeds to judgment or not. *Id.*
7. **ELECTION TO WAIVE TORT AND TO SUE IN ASSUMPSIT ONE OF SEVERAL PERSONS** who were guilty of converting property operates in favor of his co-tort-feasors who are not parties to the action, and precludes any subsequent recovery against them for such conversion, because by such suit the plaintiff elects to consider the tort as a sale of the property, and the title is vested in the tort-feasor; and having thus divested himself of title, the plaintiff has no cause of action, unless it be one founded upon an implied sale. *Id.*

See **VENDOR AND VENDEE**, 14.

ATTACHMENT AND GARNISHMENT.

1. **GARNISHMENT OF DEBT IN SUIT.** — During the pendency of a suit against a debtor by his creditor in one court, the debtor cannot be compelled, as garnishee, to defend a suit in a different court by one seeking a judgment against him for the same debt; but where, after asserting his defense, judgment has been rendered against him in the garnishment proceeding, and he has failed to pursue his legal remedies to relieve himself from the erroneous judgment, he cannot enjoin the collection of the creditor's judgment by pleading the judgment in the garnishment proceeding, nor can the plaintiff therein intervene to prevent the collection of such judgment. *Burke v. Hance*, 28.

2. **GARNISHMENT OF FINAL JUDGMENT — EXEMPTIONS.** — A final judgment for conversion is subject to garnishment in an action in another court, when there is nothing to show how much of the judgment proceeded from exempt property, and part of the property converted was not exempt. *Id.*
3. **EXEMPTION AS LABORER.** — If the occupation of the defendant debtor is shown, it is a question of law whether he is within the meaning of a statute exempting certain wages of a "laboring man or woman" from seizure. *Wildner v. Ferguson*, 495.
4. **EXEMPTION AS LABORER.** — An agent who sells goods by sample is not within the meaning of a statute exempting certain wages of "a laboring man or woman" from seizure. The statute refers only to those whose work is manual. *Id.*

ATTORNEY AND CLIENT.

1. **SKILL AND DILIGENCE REQUIRED OF ATTORNEY.** — Attorneys are held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and others who hold themselves out to the world as possessing skill and qualifications in their respective trades and professions. *Citizens' Loan Fund etc. Ass'n v. Friedley*, 320.
2. **LIABILITY OF ATTORNEY.** — An attorney who undertakes the management of business committed to his charge does not insure absolute success, but impliedly represents that he possesses the skill and will exhibit the diligence ordinarily possessed and employed by well-informed members of his profession; and he will be liable if his client's interests suffer on account of his failure to understand and apply those rules and principles of law that are well established and clearly defined in elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession. *Id.*
3. **LIABILITY OF ATTORNEY.** — An attorney is liable for the consequences of ignorance or non-observance of the rules of practice of his court, or want of care in the preparation of the case for trial; but he is not liable for an error of judgment upon points of new occurrence, or of nice or doubtful construction. *Id.*
4. **LIABILITY OF ATTORNEY.** — An attorney is liable for negligence who is ignorant of the ordinary and settled rules of pleading and practice, and of the statutes and published decisions of his own state; but he is not liable where he accepts as true and correct law a decision of the court of last resort of such state; nor is he liable for a mistake in reference to a matter in which the members of his profession possessed of reasonable skill and knowledge may differ as to the law until it has been settled by such court; nor is he liable if mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers. *Id.*
5. **LIABILITY OF ATTORNEY.** — An attorney is not liable for a mistake in advice given prior to the publication of a decision of the court of last resort in his own state establishing a contrary rule. *Id.*

See **RECEIVERS**, 16.

BALLOTS.

See **ELECTIONS**, 13.

BILL OF EXCEPTIONS.*See* TRIAL, 7; WITNESSES, 2.**BILLS OF LADING.***See* CARRIERS, 17.**BONDS.***See* SALES, 8.**BREACH OF PEACE.***See* ARREST, 4.**BROKERS.**

1. **STOCK-BROKER NOT BOUND TO MAKE ACTUAL PURCHASE OF STOCKS HELD ON MARGIN.** — Where stock-brokers agree to buy certain stocks for a customer on a margin, and to hold them subject to his demand, the customer to advance sufficient money, when required, to protect them from loss, they are not bound to make an actual purchase of the stocks, but it is enough if they were ready and able at any time to procure them in the market and deliver them on demand at the price of the day of the contract. And if the stocks depreciate to the extent of the customer's account, no damage could have resulted to him from their failure to make an actual purchase. *Ingraham v. Taylor*, 291.
2. **LIABILITY OF BROKER SELLING STOCKS FOR TRUSTEE IN VIOLATION OF LATTER'S TRUST.** — A testator by his will gave certain securities to a trustee for the benefit of his daughter N., the income to be paid to her for life, and the remainder to go to her heirs. The will provided that N. might receive one thousand dollars a year of the principal, but not in all to exceed one half of the principal. The trustee and N. used the trust property in stock speculations, the defendants acting as their brokers, receiving stocks from them, and charging a commission. The trust estate was lost in these speculations, and the plaintiff, who was appointed trustee in place of the former trustee, removed, brought suit to recover from the defendants the value of the trust property which they had received and sold, and it was held, — 1. So far as they sold the securities as mere agents, in good faith, without knowledge, actual or constructive, that other persons interested in the trust were being prejudiced, and had fully accounted, they were not liable. The trustee might rightfully sell for the purpose of reinvesting, or of paying N. such portions of the principal as she was entitled to, and the defendants might safely act as her agents for that purpose; but if, with the defendants' knowledge, the trustee sold for other purposes, in violation of the trust, they were liable, even though they sold as agents. 2. If the trustee sold the securities constituting the trust estate for the purpose of using the proceeds in stock speculations, or of permitting N. so to use them, it was a breach of trust in which the defendants participated, if they purchased, knowing the purpose. And if they were holding stocks on margins for the trustee and N., and received the trust estate as security, and subsequently sold it, using the avails to make good the losses, they were liable for the trust estate so received by them. 3. The trust, its terms, conditions, and limitations, having been matters of record, the defendants took the property with full knowledge that others besides the trustee and N. were

interested in it, because, knowing that it was trust property, they were put upon inquiry, and the law imputed to them such knowledge as they would have obtained had they made inquiry. They were therefore liable for the trust property, if any, in their hands, and for the avails of that which they had disposed of, less the amount that had been used for the legitimate purposes of the trust. 4. So far as the question of notice to the defendants was concerned, it mattered not whether the gift over was valid or void; it was enough that there were possible parties who had an interest in the property besides the trustee and N.; and as that fact clearly appeared on the face of the will, the trust was neither unknown nor unsuspected. 5. The action of the probate court in distributing the property to trustees in trust for N. was not conclusive as to the parties interested in the estate. The distribution was in terms made under the will, which gave her only a life estate. The court made no distribution of the remainder. 6. On the question of notice to the defendants, it mattered not that there might be doubt as to whom the reversioners were, there being no doubt or uncertainty as to the equities of the reversioners. 7. So far as the defendants were concerned, any property purchased by the trustees to take the place of that sold by them was trust property. 8. The plaintiff's right to recover did not depend upon N.'s interest in the property. 9. The former trustee could not be held liable for the squandering of the estate by his successor, although notice of his resignation had not been given to the heirs. *Leake v. Watson*, 270.

BURDEN OF PROOF.

See CARRIERS, 6; CRIMINAL LAW, 13-15.

CARRIERS.

1. DUTY AS TO GOODS CARRIED. — A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise due diligence to protect them from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. *Beard v. Illinois Central R'y Co.*, 381.
2. DUTY TO PROTECT GOODS. — A common carrier receiving goods for transportation must guard them from destruction by the elements, from the effect of delays, and from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. Unknown causes, or those inherent in the nature of the goods, and which cannot be, in the exercise of diligence, averted, will not render the carrier liable. Hence the nature of the goods must be considered in determining the carrier's duty. *Id.*
3. DUTY AS TO PERISHABLE GOODS. — A common carrier who has knowingly received butter for transportation must exercise the care and diligence necessary to protect it from heat, and carry it in improved cars, if such cars are in use and will protect it, and cannot escape liability for not safely transporting on the ground that it did not have cars sufficient for that purpose; that the car was sealed when received; that it was customary to haul cars received from the connecting carrier without changing the goods in them, or that the rate of charges, as shown by the way-bill, was for common cars only. *Id.*
4. FREIGHT CHARGES AS LIMITING LIABILITY. — Freight charges for perishable goods will not limit the care to be exercised by the carrier in trans-

- portation, nor restrict his liability, unless the charges fixed in the way-bill express a contract that the goods may be carried so as to destroy their value, and that excuses the carrier from the exercise of the care required of him by law. *Id.*
5. **EVIDENCE OF WANT OF CARE.** — In an action against a common carrier to recover for the loss of a car of butter, and alleging negligence on his part for not taking proper precautions to preserve it during transportation, evidence is admissible to show a custom among carriers to put butter in cold storage, when refrigerator-cars were not ready to receive it. *Id.*
6. **PRESUMPTION AS TO CONDITION OF GOODS — BURDEN OF PROOF.** — The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of a connecting carrier, and the burden of proof is on him to show that they were not in good condition when received by him. *Id.*
7. **COMMON CARRIER CANNOT EXCUSE HIMSELF FOR FAILURE TO CARRY AND DELIVER** because prevented by human agency not under his control, without fault on his part; but if property is wholly lost or partially decayed through some inherent quality, without fault on the part of the carrier, this will excuse the failure to safely carry and deliver. *Gulf etc. Ry Co. v. Levi*, 45.
8. **DELAY CAUSED BY STRIKES OR MOBS.** — A common carrier is not liable for loss or damage naturally resulting from delay in delivering freight, caused by mobs or a strike of employees, accompanied by intimidation and violence which could not be prevented or suppressed by the carrier or the civil authorities. All that is required of the carrier in such case is, that he shall exercise due care and diligence to guard against the delay, and omit no reasonable effort to secure the safety of the property. *Id.*
9. **DUTY TO DELIVER TO CONNECTING LINE.** — Where a common carrier receives goods consigned beyond the terminus of its own line, with an agreement to deliver to a connecting line, the contract of shipment imposes not only the duty to transport safely over its own road, but also to safely deliver to the next connecting carrier. *Alabama Great S. R. R. Co. v. Thomas*, 119.
10. **DUTY TO DELIVER TO CONNECTING LINE.** — The carrier's liability, if he has undertaken to carry goods beyond his own line, does not terminate upon the arrival of the goods at his own terminal depot, but continues when there is a further duty to carry over an intermediate short line belonging to it, and connecting with the connecting road, in order to complete the act of delivery to the connecting carrier. *Id.*
11. **LIABILITY OVER CONNECTING LINE.** — A carrier, in undertaking to forward goods beyond the terminus of its own route, is bound to obey all reasonable instructions of the shipper or consignor not in conflict with the terms of the contract of shipment; and if it disregard such instructions, and the goods are lost by this act of negligence, it is liable for their value, though the loss occurs while they are in the possession of another carrier or person. *Id.*
12. **LIABILITY FOR SAFE DELIVERY OF LIVE-STOCK TO CONNECTING LINE.** — Where a carrier has contracted to carry live-stock over his own road and deliver them to a connecting carrier, it is his duty, after the transit on his own road is completed, and the stock transferred to cars accepted by the shipper preparatory to delivery to the connecting line, to either permit the consignor to put such cars in proper condition to safely trans-

- port the stock, as he had agreed to do, or himself perform this duty with reasonable care and diligence; and for a failure so to do, the carrier is liable for a resulting injury to the stock. This duty includes the providing of suitable bedding for the cars, partitions to keep the cattle apart, and the exercise of proper care to prevent crowding of the stock in the cars. *Id.*
12. **DELIVERY OF LIVE-STOCK TO CONNECTING CARRIER—EVIDENCE TO EXCUSE CONSIGNOR'S LIABILITY.**—In an action against a carrier on the contract of carriage, to recover for injuries to live-stock arising from negligence in delivery to a connecting carrier, evidence showing an offer on the part of the consignor to perform all the duties imposed upon him by the contract is admissible. *Id.*
 14. **LIABILITY OVER CONNECTING LINE AS FORWARDER.**—In so far as a carrier acts as a mere forwarder, assuming as agent of the consignor to have the goods forwarded by a connecting line, he is liable only as bailee for the exercise of ordinary care, or such care as persons of ordinary prudence exercise in reference to their own property under like circumstances. *Id.*
 15. **LIMITATION OF LIABILITY BY CONTRACT.**—A carrier cannot limit his liability by contract, so as to evade responsibility for injuries which may occur through the negligence of his servants. Such contract is contrary to public policy. *Id.*
 16. **LIABILITY.**—The liability of a common carrier, except so far as lawfully limited by special contract, is that of an insurer against all losses, except those occasioned by the act of God, the public enemy, or the contributory negligence of the consignor. *Id.*
 17. **BILL OF LADING, CONSTRUCTION OF.**—In construing a bill of lading given by the carrier for the safe transportation and delivery of goods shipped by a consignor, the contract will be construed most strongly against the carrier, and favorably to the consignor, in case of doubt in any matter of construction. *Id.*
 18. **PLEADING—SUFFICIENCY OF ANSWER.**—Where the petition in an action against a company owning and operating a freight tug-boat alleges that such company was a carrier of passengers, and that plaintiff's child was killed while a passenger on such boat, an answer alleging that the boat was not a passenger-boat, and that the employees of the company were forbidden to carry any one as a passenger without a special permit, which was not in this case obtained, is sufficient. *Cook v. Houston etc. Co., 52.*
 19. **RUNNING TRAINS AT SPEED PROHIBITED BY ORDINANCE NEGLIGENCE PER SE.**—A cable-railway company in running its trains through the streets of a city at a rate of speed prohibited by ordinance is guilty of negligence *per se*. And where a passenger, on alighting from a car of the company running at such prohibited rate of speed, is injured by a similar car running in the opposite direction, it cannot be said that the speed of the train had no direct agency in causing the injury. *Weber v. Kansas City Cable R'y Co., 541.*
 20. **DUTY OF RAILWAY COMPANY TO PASSENGERS GETTING ON AND OFF.**—It is the duty of a railway company to stop its cars and to let them remain at rest long enough for passengers to get on and off with safety, and its servants in charge of an approaching train must govern their conduct accordingly. *Id.*
 21. **CONTRIBUTORY NEGLIGENCE OF RAILWAY PASSENGER BARS RECOVERY.**—While carriers of passengers are held to a very high degree of care, there

is a corresponding obligation on the part of the passenger to act with prudence; and if his negligent act contributes to the bringing about of the injury, he cannot recover. *Id.*

22. LEAVING CAR DOOR OPEN NOT INVITATION TO ALIGHT WHEN. — The fact that the door of a railway car is left open and unguarded cannot be regarded as an invitation for a passenger to alight while the train is running at full speed. The fact that a train does not stop or check up is a warning to passengers not to get off. *Id.*

23. RIGHTS OF PASSENGERS AT RAILWAY STATIONS. — Passengers arriving at or departing from the railway station of a common carrier have a right to equal convenience and opportunity to approach such station or to depart therefrom, and are entitled to the benefit of whatever competition may grow out of the public demands, and the contests of others to supply such demands and receive compensation therefor. *Montana etc. R'y Co. v. Langlois*, 745.

See RAILROAD COMPANIES.

CAVEAT EMPTOR.

See SALES, 6.

CERTIFICATION OF CHECKS.

See NEGOTIABLE INSTRUMENTS, 8-12.

'CHALLENGES TO JURORS.

See CRIMINAL LAW, 10.

CHARACTER.

See CRIMINAL LAW, 11; EVIDENCE, 5, 6.

CHARTER.

See CONSTITUTIONAL LAW, 1; CORPORATIONS, 4-17.

CHattel MORTGAGES.

1. OF CROPS — RECORD AS NOTICE AFTER HARVESTING. — The mortgagor in a recorded mortgage of a growing crop, if left in possession after it is harvested, possesses a beneficial interest in the property until foreclosure, and may pass a good title to one who purchases in good faith in open market without actual notice of the mortgage. *Gillilan v. Kendall*, 766.
2. RECORD AS NOTICE. — A recorded chattel mortgage of growing grain is not notice of a mortgage on the same grain in a crib or bin, where it has been lawfully placed by the mortgagee, or by the mortgagor with his consent, so as to affect the title of an innocent purchaser who has bought it of the mortgagor in open market without actual notice of the mortgage. *Id.*
3. LIEN FOR EXPENSE IN COLLECTING CHATTEL MORTGAGE. — Where a chattel mortgage provides that the mortgagee may, upon default, retain from the proceeds of the sale of the mortgaged property an attorney's fee and such other expense as may be incurred, he may charge and enforce the necessary expense of unsuccessful efforts to take possession of the property, notwithstanding a tender of the bare debt thereafter; but the

attorney's fees cannot be collected, unless there has been a foreclosure.
Ransom v. Mott, 489.

See EXECUTION; MORTGAGES.

CHECKS.

See NEGOTIABLE INSTRUMENTS, 8-12.

COMMON CARRIERS.

See CARRIERS.

COMMON COUNTS.

See ASSUMPSIT, 1.

COMPLAINT.

See PLEADING, 1.

CONFLICT OF LAWS.

See CORPORATIONS, 24.

CONNECTING LINES.

See CARRIERS, 9-14.

CONSIDERATION.

See FRAUDULENT CONVEYANCES, 11-15; INFANTS, 2, 3; SPECIFIC PERFORMANCE, 3.

CONSPIRACY.

See CRIMINAL LAW, 6-8, 17, 18.

CONSTITUTIONAL LAW.

1. TRIAL WITHOUT JURY. — A city charter providing that prosecutions for violations of the city ordinances shall be tried by the police court without the intervention of a jury is not void as being in conflict with a constitutional provision that the right of trial by jury shall remain inviolate, when the provisions of such charter apply only to minor misdemeanors, and have no reference to the violation of the criminal laws of the state, wherein express provision is made for trial by jury. *Lieberman v. State*, 791.
2. UNDER CONSTITUTIONAL GUARANTY OF PERSONAL LIBERTY, one may travel along the public highways or in public places, and while conducting himself in an orderly and decent manner, neither interfering with nor disturbing another's rights, he will be protected, not only in his person, but in his safe conduct. No one can be restrained of his liberty unless he has transgressed some law. *Pinkerton v. Verberg*, 473.
3. PERSONAL LIBERTY. — A law which places the safe-keeping and conduct of another in the hands of a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, is oppressive, unjust, and unconstitutional. *Id.*

See ELECTIONS, 2-12; MECHANIC'S LIEN; MUNICIPAL CORPORATIONS, 12, 13; SUNDAY.

CONTRACTS.

1. **CONSTRUCTION — EVIDENCE OF PARTIES.** — The intention of the parties to a written contract must be ascertained from the terms employed, the subject-matter, the attendant circumstances, and the object to be accomplished. The parties cannot testify to their understanding and intention, to aid in the construction. *Davis v. Robert*, 126.
2. **SUFFICIENCY OF, NOTWITHSTANDING IMPERFECTIONS.** — Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the court to ascertain the terms and conditions on which the parties intended to bind themselves. *Witty v. Michigan Mutual Life Ins. Co.*, 327.
3. **RELIEF AGAINST UNANTICIPATED ACCIDENT.** — Where an unanticipated accident occurs not provided for when the contract was made, and which leaves one of the parties remediless in a court of law, equity may be invoked to give relief. *Bloomington v. Smith*, 310.
4. **CONTRACT NOT IN RESTRAINT OF TRADE WHEN.** — A contract not in general restraint of trade, but limited as to place and person, which does not deprive the public of the industry of the party restricted, but which is simply a contract for the enlistment of such party's services as an agent of the other party to the contract, is not void as being in restraint of trade. Where, therefore, a party contracts to give to another the sole and exclusive right to sell and deal in a certain brand of cigars in a state, and not to sell said brand of cigars to any one else in said state, in consideration that the other party to the contract ceases to advertise and sell other brands of cigars from which he has been deriving profit, and purchases said brand of cigars from the former, and introduces and promotes the sale thereof in said state, such contract is valid, and not in restraint of trade. *Newell v. Meyendorff*, 738.

See ASSIGNMENT, 1-5; CORPORATIONS, 19; HUSBAND AND WIFE, 3, 4; INFANTS, 1-5; LANDLORD AND TENANT, 5; MUNICIPAL CORPORATIONS, 1-3; RECEIVERS, 2-4; SPECIFIC PERFORMANCE, 1, 2.

CONTRACTS FOR SALE OF REALTY.

See VENDOR AND VENDEE.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE; CARRIERS, 21, 22.

CONVERSION.

See ASSUMPSIT, 1-7.

CORPORATIONS.

1. **RATIFICATION.** — THE ASSENT OF A MAJORITY OF THE STOCKHOLDERS TO THE EXECUTION OF A CORPORATE MORTGAGE, expressed elsewhere than at a regular meeting, and given separately, and at different times, to a person not authorized by law or resolution to execute mortgages for such corporation, is not binding upon it; nor does the receipt and use of the proceeds of such mortgage by the corporation render it binding upon the latter. *Duke v. Markham*, 889.
2. **MORTGAGE NOT UNDER SEAL — PRESUMPTION.** — While a seal is not essential to the validity of a chattel mortgage alleged to have been executed by a corporation, still, in its absence, there is no presumption that the

- act is a corporate act, and it devolves upon the party relying upon the mortgage to show that the officer or agent had authority to execute it. *Id.*
3. **MORTGAGE, EXECUTION OF — REGISTRATION.** — In the absence of proof of the proper execution and acknowledgment of a corporate mortgage, its registration is unauthorized, and ineffectual to pass title as against creditors or purchasers. *Id.*
 4. **TO ENTITLE THE STATE TO A FORFEITURE OF THE CHARTER OF A CORPORATION,** it must show, on the part of such corporation, some sin against the law of its being which produces, or tends to produce, injury to the public. The transgression must be material and serious, and such as to harm or menace the public welfare; for the state does not concern itself with the quarrels of private litigants. *People v. North River S. R. Co.*, 843.
 5. **FORMATION OF TRUST, WHEN SUFFICIENT TO FORFEIT CHARTER.** — If a corporation becomes an integral part of a combination which possesses over it absolute control, which has absorbed most of its corporate functions, and dictates the extent, manner, and terms of its entire business activity; if that combination draws unto its control other corporations in the same business; if all the stock is transferred to a central board, and in exchange for it certificates are taken and distributed to its own stockholders, carrying a proportionate interest in what it describes as its capital stock, new directors being chosen by the board, who are made eligible by the gift to them of single shares, and liable to be removed under the terms of their appointment at any moment of independent action; if it loses its power to make a dividend, and is compelled to pay over its net earnings to a master whose servant it has become, and ceases to carry on business under orders of that master, cannot stir without his approval, and yet is entitled to receive from the earnings of the other corporations its proportionate share of all profits, for division among its own stockholders, who hold substituted certificates, and is liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other coveted corporations and their business, — then such corporation has been guilty of an excess and abuse of its power which threatens and harms the public welfare, and justifies a judgment dissolving the corporation. *Id.*
 6. **CORPORATE CONDUCT MAY TAKE PLACE WITHOUT THE TRUSTEES OR DIRECTORS FORMALLY ACTING AS SUCH;** and where that conduct is directed and produced by the whole body, both of officers and stockholders, it is of a corporate character, and if illegal and injurious, may deserve and receive the penalty of dissolution. *Id.*
 7. **FORFEITURE OF FRANCHISE FOR INACTION.** — If a corporation holds its franchise in silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the state can put its finger and say, This the corporation has done by the agency through which it is authorized to act, — such inaction is corporate conduct which the state may question and punish without searching for a formal corporate act. *Id.*
 8. **CORPORATE CONDUCT, WHAT IS.** — If the directors of a corporation see its stockholders pervert its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest,

- and silently acquiesce, as directors, in the wrong which as stockholders they have themselves helped to commit, this is corporate conduct, though there be an utter absence of directors' resolutions. *Id.*
9. **CORPORATE ACTION, WHAT IS.** — When the stockholders of a corporation all act collectively and as an aggregate body, without the least exception, and, so acting, reach results and accomplish purposes clearly corporate in their character and affecting the vitality, independence, and utility of the corporation itself, the court cannot hesitate to conclude that there has been conduct which the state can review and punish by declaring a forfeiture of the corporate franchises and charter. *Id.*
 10. **CORPORATIONS, PARTNERSHIP BETWEEN.** — For corporations to enter into partnership is a violation of the law. *Id.*
 11. **RECEIVER OF A CORPORATION WHICH HAS FORFEITED ITS CORPORATE RIGHTS.** — Notwithstanding the provision of the code of California declaring that a receiver may be appointed "in cases where a corporation has been dissolved, or is insolvent, or in danger of insolvency, or has forfeited its rights," a court which enters judgment of forfeiture against a corporation at a suit of the state for abuses of its franchises has no authority to appoint a receiver of the corporate assets, unless at the instance of some person interested as a creditor or stockholder, and upon a showing that such appointment is necessary for the protection of its rights. *Havemeyer v. Superior Court*, 192.
 12. **WHEN A CORPORATION CEASES TO EXIST,** no matter from what cause, its property is left to be disposed of according to law. It neither reverts to its grantors nor escheats to the state, but belongs, after the payment of the corporate debts, to those who were stockholders at the date of its dissolution. *Id.*
 13. **CORPORATIONS, MANAGERS OF DISSOLVED.** — Under the code of California, the directors of a corporation at the time of its dissolution are trustees of the creditors and stockholders, and have full power to settle its affairs, unless other persons are appointed by the court; and after a judgment of forfeiture is entered against a corporation, its directors are entitled to act as such trustees, and to settle its affairs. They may be called to account in a court of equity by an appropriate action or proceeding by any party in interest, but until so called to account, no court has any power to appoint a receiver to take possession of the corporate property, or to otherwise exercise the functions of such directors. *Id.*
 14. **RECEIVER OF CORPORATION, VOID APPOINTMENT OF.** — ORDER APPOINTING A RECEIVER OF A CORPORATION AT THE INSTANCE OF THE STATE, and after a judgment of forfeiture has been entered against such corporation, and in the absence of any application for such appointment on behalf of any of its creditors or stockholders, is void. *Id.*
 15. **APPEAL — STAY OF PROCEEDINGS — APPOINTMENT OF RECEIVER AFTER.** — When a judgment has been entered against a corporation forfeiting its charter and franchises, and an appeal has been taken therefrom, and a bond given sufficient to stay the execution of judgment, a further order entered in the action, appointing a receiver for the purpose of carrying the judgment into effect, is void. *Id.*
 16. **AN APPEAL FROM JUDGMENT FORFEITTING THE CHARTER AND FRANCHISE OF A CORPORATION,** supported by a sufficient bond, stays all further proceedings under such judgment. *Id.*
 17. **PUNISHMENT OF, FOR VIOLATING CHARTER.** — When a corporate franchise is unlawfully held or exercised, the attorney-general may, under

- the laws of California, bring an action for its forfeiture; but the only judgment which can be entered in such action is, that the defendant be excluded from the franchise it has abused, and that it pay a fine not exceeding five thousand dollars. No other punishment can be imposed. Hence a court cannot in such action appoint a receiver and take the corporate assets and the management of its affairs out of the hands of the directors, to whom they are by law confided, where no creditor, stockholder, or member of the corporation asks for such receivership. *Id.*
18. **WANT OF PENAL LEGISLATION WILL NOT BE SUPPLIED BY THE COURTS.** — If the legislation has not provided adequate punishment for the violation of a corporate charter and the abuse of the corporate franchises, the court will not impose any further punishment than that provided. *Id.*
19. **CORPORATE CONTRACTS IN RESTRAINT OF TRADE.** — **FOR THE MAKING OF CONTRACTS IN RESTRAINT OF TRADE, THE ONLY PENALTY** is, that the courts refuse to enforce them. Such a contract, when made by a corporation, even though it justifies the forfeiture of its charter, does not authorize a court to appoint a receiver of the corporation, nor to take the management of its affairs out of the hands of the directors, who, upon its dissolution, become, under the statute of California, trustees of such assets for the benefit of creditors and stockholders. *Id.*
20. **UPON THE FORFEITURE OF THE CHARTER OF A CORPORATION** for abuses of its franchise, its property is not forfeited to the state, but is held by its directors in trust for its creditors, and for the payment of its debts. *Id.*
21. **THE UNAUTHORIZED TRANSFER OF THE STOCK OF A CORPORATION** is a wrong done to the owner of such stock, for which not only the person who makes it, but any one knowingly assisting in the wrong, is responsible. *Taft v. Presidio R. R. Co.*, 166.
22. **TRANSFER OF STOCK FROM A PRINCIPAL TO HIS AGENT, ON THE BOOKS OF A CORPORATION,** is not authorized by the fact that the principal has given the agent general power of attorney, empowering him, among other things, "to sell, dispose of, transfer, and deliver all or any of my interest in the capital stock of any association, bodies corporate or politic." *Id.*
23. **CORPORATION IS LIABLE FOR THE TRANSFER OF A CERTIFICATE OF STOCK** when it accepts the surrender of such certificate, and issues a new certificate therefor to and in the name of an agent of the owner of the certificate, when the certificate is not indorsed, either by the owner or by the agent, though the agent had a general power of attorney which empowered him to sell, transfer, or deliver all the interest of the principal in the capital stock of any corporation, if the by-laws of the corporation declare that the stock shall be transferred upon proper assignment and delivery to the assignee of the certificate. Every stockholder has the right to expect that the corporation will observe its own by-laws, and will not transfer his stock unless it is assigned to the assignee. *Id.*
24. **LIABILITY OF STOCKHOLDER — CONFLICT OF LAWS.** — A stockholder in a corporation organized under the laws of another state contracts with reference to all the laws of that state which affect its organization or enter into its constitution. The extent of his individual liability as a shareholder to the creditors of the company is to be determined and enforced by the laws of that state, wherever necessary jurisdiction of the parties can be obtained, under the remedy provided by the laws of the forum. *First Nat. Bank v. Gustin Minerva etc. Co.*, 510.

25. **LIABILITY OF STOCKHOLDERS TO CREDITORS.** — A creditor who deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid in money or property to the full amount of its par value deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the share-holders than the corporation could claim as part of its assets. *Id.*
26. **LIABILITY OF STOCKHOLDERS TO CREDITORS.** — Where a corporation, with which a creditor has dealt with knowledge that its nominal paid-up capital is not in fact paid, issues new shares after the claim of the creditor arises, he has no right to insist upon a contribution from the holders of these shares. *Id.*
27. **JURISDICTION IN ACTIONS AGAINST.** — An action may be maintained against a domestic corporation in the state of its incorporation, under a contract made in that state, to recover for injuries to live-stock transported over its road, though such injury occurred at its terminus in another state. *Alabama Great S. R. R. Co. v. Thomas*, 119.
See **ESTOPPEL**, 1; **INSURANCE**, 1.

COVENANTS.

See **SPECIFIC PERFORMANCE**, 2.

CRIMINAL LAW.

1. **PROSECUTION IS NOT BOUND TO CALL WITNESSES** at the request of the accused. If the latter requires their testimony, he must call them himself. *Keller v. State*, 318.
2. **INDICTMENT FOR ASSAULT WITH INTENT TO KILL MUST CHARGE FELONIOUS INTENT.** — A crime that is liable to be punished by imprisonment in the penitentiary is a felony. Assault with intent to kill is such a crime, and an indictment therefor must therefore charge that the assault was made with felonious intent, for without a felonious intent there can be no felony. *State v. Clayton*, 565.
3. **ASSAULT MAY BE CHARGED IN INDICTMENT IN GENERAL TERMS** without specifying the means by which it was made. *Id.*
4. **EVIDENCE OF PREVIOUS DIFFICULTY WITH WHICH DEFENDANT WAS NOT CONNECTED INADMISSIBLE.** — On the trial of a prisoner charged with felonious assault, it is error to admit evidence of a previous difficulty between the party alleged to have been assaulted and the defendant's brother, where the defendant was in no way connected with it. And if such evidence is admitted by the court, with the promise that unless defendant's connection with such prior difficulty is shown, it will withdraw it from the jury, and this is not done, the action of the court has the effect to sanction the inadmissible testimony, and is error. *Id.*
5. **LAW SPECIALLY PROTECTS OFFICER ONLY WHILE ACTUALLY ENGAGED IN PERFORMING OFFICIAL DUTY;** when engaged in a mere personal encounter, he has no greater rights than any other citizen. It is therefore error, on the trial of a prisoner for assault to kill, to admit evidence that the person alleged to have been assaulted at the time held the office of town marshal, when there is no testimony showing that he was then acting in his official capacity as a peace-officer. *Id.*
6. **CONSPIRACY, PROOF OF.** — A conspiracy to do an unlawful act need not be shown by positive testimony; nor need proof be made that there was

prearrangement to do the specific wrong complained of. This may be inferred from the conduct of the participants. *Martin v. State*, 91.

7. **CONSPIRACY — WHAT CONSTITUTES — INDIVIDUAL LIABILITY OF CONSPIRATORS.** — When two or more persons enter upon an unlawful enterprise, with a common purpose to aid, assist, advise, or encourage each other in whatever may grow out of such enterprise, each is responsible, civilly and criminally, for everything which may proximately result from such unlawful purpose, whether specifically contemplated or not, and whether actually perpetrated by all, or less than all, of the conspirators; but neither is liable for the independent act of another, outside the common purpose, and growing out of the individual malice of the perpetrator. *Id.*
8. **EVIDENCE. — ACTS AND DECLARATIONS OF ONE CONSPIRATOR,** immediately after the killing of their victim by his co-conspirators, are admissible as part of the *res gestæ*, and as being part of one continuous transaction. *Id.*
9. **JURY AND JURORS.** — *Venue* of special jurors summoned for a trial of murder cannot be quashed upon the grounds that one of those named is a minor, that another is a female, that another has been dead for more than a year, that another is a non-resident of the county, or that there is a mistake in the name of another. In such case it is the duty of the court to order the names of the disqualified persons to be discarded, and others to be summoned to supply their places, unless, in the opinion of the court, justice requires otherwise. *Gibson v. State*, 96.
10. **JURY AND JURORS — PEREMPTORY CHALLENGES.** — Under the Alabama act of 1899, where two or more defendants are on trial jointly for murder, each is entitled to one half of twenty-one peremptory challenges, and it is a compliance with the statute, where two are thus on trial, to allow one eleven, and the other ten, peremptory challenges. *Id.*
MURDER — EVIDENCE OF GOOD CHARACTER, AND ITS EFFECT. — A person on trial for murder is permitted to prove his good character for peace in the neighborhood in which he resides. But his own evidence to this effect cannot be considered by the jury as sustaining his credibility as a witness in his own behalf, when the prosecution has not assailed his character for truth and veracity. *Id.*
11. **MURDER — DUTY TO RETREAT — JUSTIFIABLE KILLING.** — A man assailed in his own house, if justified in ordering or expelling the deceased from his premises, is not bound to retreat to avoid killing his assailant, even though a retreat could be safely made. *Brinkley v. State*, 87.
12. **MURDER — SELF-DEFENSE — BURDEN OF PROOF.** — After an intentional killing with a deadly weapon has been proved, the burden of proof is on the defendant to show a pressing necessity on his part to take life in self-defense, and that he could not safely retreat without apparently increasing his peril, unless these facts are shown by the evidence produced by the prosecution. *Gibson v. State*, 96.
13. **MURDER — SELF-DEFENSE — BURDEN OF PROOF OF PROVOCATION.** — In murder cases the burden of proof is on the state, under a plea of self-defense, to show that the defendant was in fault in bringing on or provoking the difficulty, and not on defendant to prove that he did not provoke it. *Id.*
14. **MURDER — PRESUMPTION FROM USE OF DEADLY WEAPON.** — The use of a deadly weapon in cases of homicide raises the presumption of malice, unless this is repelled by the evidence which proves the killing. *Id.*

16. **MURDER — PROVOCATION.** — Where a difficulty is sought by defendant with the deceased for the purpose of beating or chastising him, and in pursuance of such purpose defendant arms himself with a pistol, to be used in case of necessity, and with it kills deceased in pursuance of such purpose, the killing is murder, although it was necessary to use the pistol in order to save his own life, or his body from great harm. *Id.*
17. **CONSPIRACY TO ASSAULT RESULTING IN MURDER.** — Where a conspiracy between defendants to assault the deceased is established, and such assault results in killing him, each conspirator is criminally liable for the acts of the other, in the prosecution of the common design, which follow incidentally as one of its natural and probable consequences, even though not intended as part of the original plan. *Id.*
18. **CONSPIRACY TO KILL** need not be proved by an express agreement on the part of defendants to attack or kill the deceased. An implied understanding between them to that effect, established by circumstances, is sufficient. The presence of one defendant, aiding, abetting, and encouraging the other in making the attack, will justify the jury in finding him criminally responsible for the attack which resulted in the death of the party assailed. *Id.*
19. **MURDER — INSTRUCTIONS.** — In murder trials the court need not charge the jury to the effect that unless the defendant is convicted of murder in the first degree he must be acquitted, and cannot be convicted of any lower grade of homicide. *Id.*
20. **MURDER — INSTRUCTIONS.** — In a murder trial, instructions, if supported by the evidence, to the effect that if the jury are reasonably satisfied, from the evidence, that the defendant was in imminent peril to life or limb, from which there was no reasonable means of escape, and that he neither provoked nor encouraged the encounter, and then fired the fatal shot, but not in malice, he cannot be convicted of murder in either the first or second degree, are proper, and should be given. *Id.*
21. **NO MURDER WITHOUT MALICE.** — There can be no murder in either degree without malice. The most culpable phase of homicide without malice is voluntary manslaughter. *Id.*
22. **MURDER — RIGHT TO INSTRUCTIONS.** — A person charged with murder is entitled to have charges given, which, without being misleading, correctly state the law of his case, if they are supported by any evidence, however weak, insufficient, or doubtful in credibility it may be. *Gibson v. State*, 96.
23. **OPINION.** — Evidence that a dance, in which a party was engaged just before being killed by another, was "indecent" is inadmissible, as being a mere expression of opinion, and not a statement of fact. *Brinkley v. State*, 87.
24. **ARREST — RESISTING OFFICER.** — A defendant cannot defy an officer holding a valid warrant for his arrest, and after tortiously obtaining possession thereof, keep the officer at bay overnight, until the accused could obtain the advice of counsel, nor is it any excuse that the next morning he proposed to go with the officer and be tried before another justice than the one named in the warrant, provided his attorney advised him that the warrant was valid. *King v. State*, 89.
25. **ARREST — RESISTING OFFICER.** — A defendant cannot defy an officer seeking to execute a valid warrant for his arrest, and determine whether he will submit to arrest, nor can he elect before what magistrate he will be

tried. It is his duty to quietly submit to arrest, and present his defenses afterward. *Id.*

See ARREST, 1-6.

CROPS.

See CHATTEL MORTGAGES, 1, 2.

DAMAGES.

1. **MEASURE OF DAMAGES FOR NEGLIGENT INJURY TO HORSE.** — In an action to recover for the negligent injury to a horse, rendering him worthless, the measure of damages is the value of the animal, and the amount, not exceeding such value, expended in good faith for medical treatment, under a reasonable belief that he could be cured or made of some value if properly cared for. *Ellis v. Hilton*, 438.
2. **CONSTRUCTION OF STATUTES GIVING DAMAGES FOR DEATH.** — The provision of the code of California that "when the death of a person, not being a minor, is caused by the wrongful act or negligence of another, his heirs or personal representatives may maintain an action for damages against the person causing the death," authorizes but one action to be brought; and when such action is brought, none other can be permitted, and though the action is by the personal representative of the decedent, all damages occasioned to his heirs may be recovered therein. *Munro v. Pacific etc. Co.*, 248.
3. **ACTION FOR CAUSING DEATH.** — In an action by an administrator of a decedent to recover damages for his death, resulting from the negligence of the defendant, the jury has a right to take into consideration the pecuniary losses suffered by his mother, if she is his heir at law. *Id.*
4. **DAMAGES FOR CAUSING DEATH OF A HUMAN BEING** allowed by the statute of California to be recovered by his heirs or personal representative do not include sorrow, suffering, or mental anguish occasioned by such death. Where the decedent left a mother or wife, the jury, however, may take into consideration her loss of comfort, society, and protection. *Id.*
5. **DEATH — DAMAGES FOR CAUSING, TO WHOM BELONG.** — The damages given by the code of California for negligently causing the death of a person are recoverable for the benefit of his heirs, and do not constitute any part of his estate. *Id.*
6. **WIDOW SUING FOR DEATH OF HUSBAND MAY TESTIFY AS TO NUMBER OF HER INFANT CHILDREN;** and it is not such error as will call for a reversal to permit her to testify that she has an infant child by a former husband, where there is nothing in the amount of the damages assessed to suggest the idea that it may have been effected by the fact that she had such child. *Soeder v. St. Louis etc. R'y Co.*, 724.

See MUNICIPAL CORPORATIONS, 10; TELEGRAPH COMPANIES, 2-5, 10; VENDOR AND VENDEE, 7; WAREHOUSEMEN.

DEATH.

See AGENCY, 1; DAMAGES, 2-6; EVIDENCE, 7; NEGLIGENCE, 1, 2; PLEADING, 2.

DECLARATIONS.

See CRIMINAL LAW, 8; EVIDENCE, 2; FRAUDULENT CONVEYANCES, 16.

DEEDS.

1. **RESERVATION REPUGNANT TO GRANTING CLAUSE IN DEED, VALIDITY OF.** — The rule that a condition, reservation, or exception, which is repugnant to the granting part of a deed is null and void, applies only in cases where the repugnancy is such that the intention of the parties cannot be ascertained from the whole instrument, or if ascertained, cannot be carried into effect in accordance with established principles of law. *Basett v. Budlong*, 404.
 2. **EVERY DEED OR CONTRACT IS SUPPOSED TO EXPRESS INTENTION OF PARTIES** executing it, and when its object or purpose is called in question in a court of justice, the first inquiry is, What is the intention of the parties as expressed in the instrument? And it is the duty of the court to so construe it as to carry out the intent of the parties making it, if no legal obstacle lies in the way. *Id.*
 3. **DEED WITH RESERVATION DOES NOT CONVEY FEE-SIMPLE ABSOLUTE WHEN.** — Where a husband conveys to his wife the farm upon which they reside, by a quitclaim deed purporting to convey the same to her and to her heirs and assigns forever, but containing, after the *habendum* clause, the conditions and reservations that she shall not convey or mortgage the granted premises during his lifetime without his written assent, or his joining in the conveyance, and that in case of her death prior to his the premises shall revert to him and his assigns, the apparent intention of the parties as expressed in such deed is, that if the grantee dies before the grantor does, she shall have no further interest in the land; but if he dies before she does, then the title in fee-simple absolute shall pass to and become vested in her. The effect of such an arrangement is, that the title to the real estate, in the event of the death of either, goes to the survivor. *Id.*
 4. **QUITCLAIM.** — An unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though based upon a valuable consideration, and taken without actual notice of the bond. *Steele v. Sioux Valley Bank*, 370.
 5. **QUITCLAIM.** — The holder of a quitclaim deed takes it charged with notice of prior equities, and is not an innocent holder. *Id.*
 6. **DEED, WHEN A MORTGAGE.** — If a mortgagor, being threatened with foreclosure, conveys the mortgaged premises to the mortgagee, in consequence of an agreement that the latter would sell the land, or permit the former to do so, and after paying the mortgage debt, interest, and expenses, pay the surplus to the mortgagor, such a conveyance is a mortgage. *Tower v. Fetz*, 795.
 7. **MORTGAGE, DEED ABSOLUTE MAY BE SHOWN TO BE.** — A deed absolute in its terms may be shown by parol evidence to have been only as a security for the payment of money, and to have been intended, as between the parties, to operate only as a mortgage. *Id.*
- See **FIXTURES**, 1, 2; **FRAUDULENT CONVEYANCES**, 2, 7; **INFANTS**, 1-5; **VENDOR AND VENDER**.

DEFAMATION.

See **LIBEL**.

DELAY.

See **CARRIERS**, 8.

DEMURRER.

See APPEAL AND ERROR, 2; TRIAL, 6.

DEPOSITIONS.

See WITNESSES, 3.

DILIGENCE.

See ATTORNEY AND CLIENT, 1-5; CARRIERS, 1-5, 12, 19; ESTOPPEL, 2; FRAUD, 9.

DIRECTORS.

See CORPORATIONS, 6.

DISAFFIRMANCE.

See INFANTS, 1-5.

DIVORCE.

See MARRIAGE AND DIVORCE, 2.

DOWER.

See ESTOPPEL, 5.

DRAINAGE.

See WATERCOURSES.

EASEMENTS.

See PARTY-WALLS; WATERCOURSES, 2-5.

ELECTION OF REMEDY.

See ASSUMPSIT, 2-7.

ELECTIONS.

1. **EXPENSE ATTENDANT UPON OBEDIENCE** to a valid election law is not a defense for not obeying it. *Attorney-General v. Detroit*, 458.
2. **ELECTION LAW** which provides that inspectors shall act as a board of registration of voters before election day, but which does not provide inspectors for every voting precinct, and which may therefore result in the disfranchisement of the electors of such precinct for want of registration, is unconstitutional and void. *Id.*
3. **CONSTITUTIONAL AUTHORITY TO ENACT LAWS** "to preserve the purity of elections and guard against abuses of the elective franchise" does not authorize, by direction or indirection, the disfranchisement of an elector without his fault or negligence. *Id.*
4. **ELECTION LAWS** to regulate election, preserve their purity, and guard against abuses of the elective franchise must be reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than to subvert and impede, the exercise of the right to vote. *Id.*
5. The constitutional term of voting residence cannot be increased by statute under the guise of regulation, any more than it can be done directly, as a mere exercise of the legislative will. *Id.*

6. **REGISTRATION.** — An election law providing for the registration of voters, but making no provision by which an elector who is sick or absent on the days of registration can vote, is unreasonable and void. *Id.*
7. **REGISTRATION LAWS,** or any law to preserve the purity of the ballot-box, may guard against abuses of the elective franchise, and prevent fraudulent voting, but cannot prevent any qualified elector from voting, or unnecessarily hinder or impair his privilege. *Id.*
8. **LAWS REGULATING.** — To prevent fraud at the ballot-box, laws may be enacted making all needful rules and regulations to that end. They must not be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise, without their fault or negligence. The law must regulate the right to vote, by facilitating its lawful exercise, and preventing its abuse, but it must not impair nor destroy it. *Id.*
9. **ELECTION LAWS,** which compel a naturalized elector to produce his certificate, or show by evidence other than his own oath that such certificate was issued, before he will be allowed to vote, make an unfair and unnecessary distinction between native-born and naturalized voters, and are therefore unconstitutional. *Id.*
10. **ELECTIONS LAWS** which provide that a native-born elector becoming of age between the last day of registration and the day of election may vote, but that a foreign-born citizen who has taken out his first papers, and whose right to vote will ripen between the completing of the registry list and the opening of the polls, cannot vote, are unfair and unconstitutional. *Id.*
11. **NO ELECTION OR REGISTRY LAW IS VALID** which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. He cannot be deprived of such right, except by his own fault or negligence. *Id.*
12. **NO ELECTION LAW IS VALID** which, under the pretext of regulation, destroys the constitutional right to vote, by annexing an additional qualification as to the number of days such voter must reside within the precinct before he can vote, or any other requisite in direct opposition to any constitutional requirement. *Id.*
13. **BALLOT WITH NAME OF CANDIDATE MISPELLED, TO BE COUNTED WHEN.** — A ballot containing the name "Dan Heyfron" should be counted for "Daniel J. Heyfron," where it is shown that he was a candidate for the office for which such ballot was cast, and that he was the only person having that surname within the county. *Heyfron v. Mahoney, 757.*
14. **FAILURE OF JUDGES OF ELECTION TO TAKE OATH NOT GROUND FOR REJECTING RETURNS.** — Where there have been a fair vote and an honest count, the returns of an election precinct should not be rejected because the judges of election were not sworn. *Id.*
15. **CHANGING PLACE OF VOTING RENDERS ELECTION VOID WHEN.** — Where an election is held at a place more than three miles from the place designated by the county commissioners, the election at that precinct is void, and the vote cast thereat should not be counted. *Id.*
16. **ILLEGAL VOTES MAY BE APPORTIONED WHEN.** — Where a certain number of illegal votes are shown to have been cast at a particular precinct, if there be evidence to justify it, the court may apportion the illegal votes, and deduct them from the whole vote received by each party to the contest, in the proportion that the vote of each bore to the whole vote cast

at the precinct, although the entire vote of the precinct might have been properly excluded. *Id.*

17. **STATEMENT OF ELECTION CONTEST MAY BE AMENDED DURING TRIAL** of the case, by correcting the names of persons and adding other names, to make it conform to the proofs. *Id.*
18. **SUBPOENA ADMISSIBLE IN EVIDENCE IN ELECTION CONTEST WHEN.**—A subpoena issued to certain alleged illegal voters, with the return thereon showing that the persons named therein could not be found, is admissible in evidence, as tending to show a proper effort on the part of the party at whose instance it was issued, to produce to the court the best evidence. *Id.*

ELEVATORS.

See **LANDLORD AND TENANT**, 4; **MASTER AND SERVANT**, 10; **PLEADING**, 2.

EMPLOYER AND EMPLOYEE.

See **MASTER AND SERVANT**.

EQUITY.

- EQUITY WILL NOT ENJOIN CLAIM OF EXCLUSIVE FRANCHISE WHEN.**—A court of equity will not restrain, by injunction or otherwise, a person from asserting a claim of exclusive privilege in the manufacture and sale of a commodity, where there is no interference with the property of the complainant, further than by making the claim of exclusive privilege or franchise. *Consumers' Gas Co. v. Kansas City Gaslight etc. Co.*, 563.

ERROR.

See **APPEAL AND ERROR**.

ESTATES.

See **DEEDS**, 3.

ESTOPPEL.

1. **PURCHASERS FROM A CORPORATION ARE NOT PRECLUDED FROM DENYING THE VALIDITY** of an order appointing a receiver and directing him to take possession of such property by the fact that in the capacity of stockholders of the corporation they appeared in the action and resisted such appointment. *Havemeyer v. Superior Court*, 192.
2. **FROM ACQUIESCENCE IN MAINTENANCE OF TELEGRAPH POLES AND WIRES.**—A man cannot erect a building on his lot by the side of telegraph and telephone poles and wires maintained in a private alley appurtenant to his lot without any protest or demurrer whatsoever against their standing there, when they are on his own land, and go on for years without finding any fault whatever, and allowing a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up against the corporation maintaining the poles the loss occasioned by such fire. *Chaffee v. Telephone etc. Co.*, 424.
3. **PARTY SETTING UP ESTOPPEL BY CONDUCT MUST SHOW THAT HE EXERCISED GOOD FAITH** and due diligence to know the truth; and if such circumstances are brought to his notice as would be certain to excite inquiry

in the mind of any prudent man, and the means of satisfying such inquiry are readily accessible, but are not used, he cannot be held to have exercised good faith or due diligence to know the truth. *Morgan v. Farrel*, 282.

4. **AGAINST MARRIED WOMAN — WAIVER OF VENDOR'S LIEN.** — A married woman is estopped to enforce a vendor's lien on land constituting her separate estate, sold and conveyed by herself and husband by joint deed in due form, when she and her husband were active in making the sale, and by their declarations and conduct induced a third person to advance to her vendee part of the purchase-money on a first mortgage on the land, with the understanding that her lien secured by second mortgage should be waived in favor of such third person. *Wilder v. Wilder*, 130.
 5. **DOWER — RELEASE OF.** — A married woman who has joined in the execution of a bond for a deed given to secure her husband's debt is estopped from claiming dower upon a foreclosure of the bond, on the ground that she had no information that it was intended as a security instead of an actual sale. *Steele v. Sioux Valley Bank*, 370.
- See AGENCY, 3; HIGHWAYS, 2; INSURANCE, 1; JUDGMENT, 1-3, 5; LIS PENDENS; NEGOTIABLE INSTRUMENTS, 6; TRIAL, 9; VENDOR AND VENDEE, 9; WATERCOURSES, 3, 4.

EVIDENCE.

1. **MATTERS OF OPINION.** — In an action to recover for injuries arising from an attempt to alight from a moving train, plaintiff may testify as to the effort made to prevent himself from falling, as this embodies a mere statement of fact, and not a conclusion of opinion. *Pennsylvania Co. v. Marion*, 330.
2. **EVIDENCE OF PLEASURE, PAIN, OR SUFFERING.** — Natural utterances and expressions indicative of pleasure or displeasure, pain or suffering, are original evidence, and competent to be received in proof of the physical or mental state they indicate, whenever that state is a pertinent inquiry. *Western Union Tel. Co. v. Henderson*, 148.
3. **LETTERS, WHEN ADMISSIBLE IN EVIDENCE TO MODIFY OR CONTRADICT OTHER LETTERS IN EVIDENCE.** — Where the plaintiff has introduced in evidence letters which had passed between the defendants, for the purpose of showing that they were partners in a certain business, the defendants may, for the purpose of showing that these letters, or some of them, had reference to other matters, and not to that business, introduce other letters that passed between them. *Morgan v. Farrel*, 282.
4. **PROOF OF OFFICIAL CHARACTER.** — The official character of a deceased person may be shown by the evidence of witnesses, who testify that at the time he was killed he was acting as town marshal, wore a badge, and carried a policeman's baton. *Martin v. State*, 91.
5. **EVIDENCE OF GOOD CHARACTER IS INADMISSIBLE BY WAY OF DEFENSE** in civil actions in which a party is charged with specific fraud. *Norris v. Stewart*, 917.
6. **EVIDENCE OF GOOD CHARACTER IS NOT ADMISSIBLE IN CIVIL ACTIONS** by way of defense, unless the nature of the action involves the general character of the party, or goes directly to it. *Id.*
7. **EVIDENCE TO REBUT PRESUMPTION OF DEATH.** — The presumption of death arising from the absence of a person for seven years without having been heard from may be rebutted by evidence sufficient to satisfy the jury that he has been heard from within that time. It is not neces-

nary to produce persons who have seen him, or to produce letters received from him, within that period. *Dowd v. Watson*, 920.

See ASSUMPSIT, 5; CARRIERS, 5, 6, 13; CONTRACTS, 1; CRIMINAL LAW, 4, 6, 8, 13, 18, 23; DAMAGES, 6; DEEDS, 7; ELECTIONS, 18; FRAUD, 5; FRAUDULENT CONVEYANCES, 4-6, 8-11, 14-16; MALICIOUS PROSECUTION, 1, 6; PAYMENT, 1-4; TELEGRAPH COMPANIES, 1, 12, 13; WILLS, 1, 2; WITNESSES.

EXECUTION.

MORTGAGOR OF CHATTELS, after default in payment of debt, and after the mortgagee has taken possession, has no interest subject to execution, and a levy, though it purports to be only on the interest of the mortgagor, will, when coupled with a refusal of the officer to surrender the goods to the mortgagee, render him liable as for their conversion. *Manchester v. Tibbette*, 816.

See FRAUDULENT CONVEYANCES, 1.

EXECUTORS AND ADMINISTRATORS.

PLEADING.—THE RIGHT OF A PLAINTIFF TO SUE AS ADMINISTRATOR sufficiently appears from an averment in his complaint that he filed a petition for letters of administration at a time and in a court designated, and that thereafter such proceedings were had that the court, by an order duly given and made, appointed him sole administrator, and that he thereafter qualified as such, and letters of administration issued to him. *Mumre v. Pacific Coast etc. Co.*, 248.

EXEMPTIONS.

See ATTACHMENT, etc., 2

EXPERTS.

See WITNESSES, 6-8.

EXPLOSIONS.

See NEGLIGENCE, 2, 3.

FALSE REPRESENTATIONS.

See FRAUD, 1-10.

FINAL JUDGMENT.

See ATTACHMENT, etc., 2.

FINDINGS.

See APPEAL AND ERROR, 1.

FIXTURES.

1. SAW-MILL AND ENGINE AND BOILER connected with and used to operate the former, all of which are attached to the land in the usual way, pass by deed thereof, unless expressly reserved. *Horne v. Smith*, 903.
2. INTENT OF VENDOR TO VARY DEED.—As between vendor and vendee, articles of personalty affixed to the freehold pass by deed of the latter,

and the intent of a vendor in placing a saw-mill, engine, and boiler upon land which he subsequently conveys is not competent to vary the terms of the deed. *Id.*

FORECLOSURE

See MORTGAGES.

FORFEITURE OF CHARTER.

See CORPORATIONS, 4-17.

FORFEITURE

See INSURANCE, 1; VENDOR AND VENDEE, 12, 13.

FORWARDERS.

See CARRIERS, 14.

FRANCHISE.

See EQUITY.

FRAUD.

1. **PRESUMPTION THAT MAN KNOWS THE LAW NOT CONCLUSIVE.**—While a man is, for public reasons, held responsible for his conduct, although ignorant of the law, there is no conclusive presumption that he actually knows the law. Where a man is defrauded by the misrepresentation of some one who assumes knowledge, and is, under the circumstances, actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. *Hess v. Culver*, 421.
2. **PARTIES NOT IN PARI DELICTO WHEN.**—The law rigidly forbids relief where the parties are in equal guilt. But while it does not draw fine distinctions in ascertaining equality of wrong, it recognises the fact that one party to an arrangement by which he is defrauded by the misrepresentation of another is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. And even actual knowledge of legal rights and liabilities is not always conclusive against relief. *Id.*
3. **LAW WILL NOT REFUSE REDRESS TO LOSER WHO WAS DEFRAUDED** into paying money without understanding fully that the dealing was improper. *Id.*
4. **LAW REQUIRING FALSE REPRESENTATIONS TO BE IN WRITING NOT APPLICABLE WHEN.**—The Michigan statute requiring false representations in writing to sustain an action upon favorable assurances concerning the character, conduct, ability, trade, or dealings of another person, is intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances, but cannot apply to conspiracies or frauds where the representation is made to enable the party making it to profit by it. *Id.*
5. **TESTIMONY SUFFICIENT TO SEND CAUSE TO JURY WHEN.**—Testimony that the defendant, by false and fraudulent pretenses, and without any con-

sideration at all, got from the plaintiff notes which the latter had to pay, and divided the plunder between himself and his confederates, if true, establishes a complete cause of action, and the case should go to the jury. *Id.*

6. FALSE REPRESENTATION OF KNOWLEDGE.—Where a party makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified affirmation amounts to an affirmation as of one's own knowledge, and makes the fraud as great as if the party knew his statement to be false. *Bullitt v. Farrar*, 485.
7. FALSE REPRESENTATION OF KNOWLEDGE.—Fraudulent intent in an action of deceit may be established by proof of a statement made as of the party's own knowledge, which is false, provided the statement is not merely matter of opinion, estimate, or judgment, but is susceptible of actual knowledge. In such case it is not necessary to prove an actual intent to deceive. *Id.*
8. REPRESENTATIONS WITHOUT KNOWLEDGE.—Whether representations are made innocently or knowingly, they operate equally as a fraud upon a party who relies upon them in ignorance of the facts, provided they are false, and made unqualifiedly as of the party's own knowledge. *Id.*
9. FALSE REPRESENTATIONS, DILIGENT INQUIRY NOT ESSENTIAL TO RECOVERY IN ACTION FOR.—In an action for false representations, it is error to instruct the jury that although the defendant made false representations as to material existent facts, calculated to affect the plaintiff's estimate of the value of property, for the purpose of inducing him to trade therefor, upon which the plaintiff relied, and by which he was induced to make the trade, yet if by diligent inquiry he might have discovered that such representations were false, then he cannot recover. And such an instruction is especially erroneous in a case where the evidence makes it apparent that the means of knowledge were not in fact equally available to the plaintiff and to the defendant. *Cottrell v. Krum*, 549.
10. WAIVER OF RIGHT TO SUE FOR FALSE REPRESENTATIONS, WHAT IS NOT.—A plaintiff does not waive his right to sue for damages for false representations by offering, after the purchase of the property, to sell it at the price which the defendant represented to be its value, nor by allowing four or five months to elapse before bringing his suit. *Id.*

See NEGOTIABLE INSTRUMENTS, 1; SALES, 7, 8.

FRAUDULENT CONVEYANCES.

1. SALE OF GOODS WITH AGREEMENT FOR EMPLOYMENT AS CLERK.—Where, on the sale of goods by an insolvent debtor, he agrees with the purchaser that the business shall be continued and himself employed as clerk at a monthly salary, the debtor thus secures to himself a benefit which renders the transaction fraudulent as to so much of the property sold as is in excess of his statutory exemptions. *Stephens v. Regenatch*, 156.
2. PLEADING FRAUD IN EXECUTION SALE.—A party seeking to set aside a conveyance because of a fraudulent combination to prevent a fair competition among bidders at an execution sale must allege the facts in his pleadings which are relied upon to establish the fraud. *Helms v. Green*, 893.

3. **DEED, HOW ATTACKED.** — In an action for the recovery of land, any deed offered as a link in the chain of title is thereby exposed to attack for incapacity in the maker, or because it is void under the statute of frauds, though it may not have been mentioned in the pleadings. *Id.*
4. **EVIDENCE — EXAMINATION OF ADVERSE PARTY.** — A party in support of the allegations of his complaint, or of a cross-action set up in a counter-claim, after eliciting admissions from the adverse party by verifying his pleadings, may examine him as to facts within his peculiar knowledge both before and at the trial, under the North Carolina Code abolishing discovery under oath. *Id.*
5. **WITNESS — EFFECT OF CALLING ADVERSE PARTY.** — A party who puts his adversary on the stand gives him an opportunity to testify in his own behalf, and waives his right of impeaching him by attacking his credibility, but retains the right of contradicting him by the testimony of other witnesses inconsistent with his. *Id.*
6. **EVIDENCE OF.** — The notorious insolvency of a grantor at the time he executes a deed to his son-in-law is a circumstance tending to show that the grantee is a participant in the fraud against creditors. *Id.*
7. **WHAT CREDITORS MAY ATTACK.** — **DEED EXECUTED TO EVADE PAYMENT OF ANY JUDGMENT** that might be recovered against the grantor in an action for slander then pending against him is fraudulent and void as to his creditors. *Id.*
8. **EVIDENCE OF.** — If a debtor much embarrassed conveys property of great value to a near relative, and the transaction is secret and known to no one but the parties, it is regarded as fraudulent; but if they are made witnesses in a case, and testify to the fairness and *bona fides* of the conveyance, and that there was no purpose of secrecy, the jury must then determine the intent which influenced the parties, and, from the evidence, find the conveyance fraudulent or otherwise. *Id.*
9. **EVIDENCE OF.** — The exclusive power of near relatives to explain every suspicious circumstance connected with a conveyance between themselves if they acted in good faith, and the neglect to do so voluntarily, or the failure of one when forced to testify to fully establish the *bona fides* of the transaction, is deemed as due to inability to show conduct consistent with an honest purpose; and the presumption of fraud arises rather from the peculiar knowledge of the parties to the deed of facts that would either confirm or remove suspicion raised by the evidence as to the embarrassment of the grantor and his relationship to the grantee and the failure to prove what they know, than from any positive evidence as to the persons actually present at the transaction. *Id.*
10. **EVIDENCE OF BADGES OF FRAUD** are suspicious circumstances that overhang a transaction; and where the parties to it withhold evidence which is exclusively within their power to produce, and which would remove all uncertainty, if believed, the law interprets such conduct most unfavorably to the suppressing party. *Id.*
11. **CONSIDERATION.** — **BURDEN OF PROOF IS ON GRANTEE** in a deed executed to him by an insolvent debtor, in payment of an existing debt, to show that the consideration paid for the conveyance was both valuable and adequate, when another creditor, who has reduced his debt to judgment, attacks the conveyance for fraud. *Mobile Sav. Bank v. McDonnell*, 137.
12. **WHAT IS VALUABLE CONSIDERATION.** — A deed by an insolvent debtor will be sustained, so far as the character of the consideration is con-

cerned, against the attack of creditors, when it appears that the grantee has legally obligated himself to pay a debt due by the grantor to a third person, whether the latter has assented to the substitution or not. *Id.*

13. VALUABLE CONSIDERATION. — The *bona fide* assumption of liability by the surety for the debt of his insolvent grantor is a valuable consideration for a deed. *Id.*
14. PROOF OF VALUABLE CONSIDERATION. — Where a deed executed by an insolvent debtor recites as consideration the payment of a debt due by the grantor to the grantee, the true consideration may be shown, when the conveyance is attacked for fraud by another creditor, to be the assumption as principal by the grantee of a debt due by the grantor to a third person, on which the grantee is surety for the grantor. *Id.*
15. ADEQUACY OF PRICE QUESTION FOR JURY. — Where a deed from an insolvent debtor to his creditor is attacked for fraud, and a valuable consideration for the conveyance is shown, but the evidence shows that the price paid is only about two thirds the value of the property, the question whether the disparity amounts to gross inadequacy is for the jury to determine. *Id.*
16. ADMISSIBILITY OF DECLARATIONS OF GRANTOR IN POSSESSION. — Where a conveyance from an insolvent debtor to his creditor is attacked for fraud, the declarations of the grantor while in possession of the land, after the conveyance, explanatory of his possession, and to the effect that he held for another, are admissible in evidence. *Id.*

FREIGHT.

See CARRIERS, 4; WAREHOUSEMEN.

GARNISHMENT.

See ATTACHMENT, etc.

GRANTS.

See VENDOR AND VENDEE, 3.

HEALTH.

See LANDLORD AND TENANT, 1-3.

HIGHWAYS.

1. ACCEPTANCE BY LONG USER. — Public user alone, when sufficiently general and long continued, will constitute an acceptance of a country road, without proof that it was laid out or formally accepted by the highway authorities. *Adams v. Iron Cliffs Co.*, 441.
2. CREATION BY PUBLIC USER — ESTOPPEL. — Where a corporation maintains a road across its property as a connecting link between other roads, and permits it to be used generally by the public for a long period, it thereby dedicates its use as such link to the public; and so long as it permits the public to use a crossing on such road without objection, it is estopped to deny that, as far as such crossing is concerned, it bears the same relation and duty to the public traveling upon it as if it were a public highway, and the corporation is bound to use due care and diligence in running its trains over such crossing, to prevent injury to passengers lawfully upon such road. *Id.*

HOMICIDE

See CRIMINAL LAW, 11-22.

HUSBAND AND WIFE.

1. ACTION BY WIFE FOR ALIENATION OF HER HUSBAND'S AFFECTIONS BY ANOTHER WOMAN. — A wife may, in her own name, and without joining her husband as plaintiff, maintain an action against a woman who has alienated from her the affections and deprived her of the society of her husband; and her right of recovery is not affected by the fact that she and her husband are still living together. The wife's right to the conjugal affection and society of her husband is the same as his right to hers, in kind, degree, and value, and damages for injury to this right must be given to her solely. *Foot v. Card*, 258.
2. ADVERSE POSSESSION. — A wife cannot hold real property adversely to her husband, which she claims to have derived from him under a parol agreement of purchase, and on which they continue to reside, and which they jointly occupy as husband and wife, and therefore cannot acquire a prescriptive title thereto which will prevail against the subsequent mortgages of the husband. *Gafford v. Strauss*, 111.
3. BUSINESS TRANSACTIONS BETWEEN. — When a wife, by proper and sufficient proof, shows that her husband owes her, she is entitled to the same remedies, and has the same standing to enforce any security for the payment of her debt she may receive, as any other creditor. *Manchester v. Tibbets*, 816.
4. HUSBAND'S MORTGAGE TO HIS WIFE TO SECURE A DEBT BARRED BY THE STATUTE OF LIMITATIONS is valid because he is not obliged by any duty to his creditors to interpose the plea of the statute of limitations. *Id.*

See INFANTS, 5; MARRIAGE AND DIVORCE; WITNESSES, 4, 5.

IMPEACHMENT.

See JUDGMENT, 1-3, 5, 6; WITNESSES, 2, 3.

IMPROVEMENTS.

See PARTITION.

INDIANS.

See MARRIAGE AND DIVORCE, 1.

INDICTMENT.

See CRIMINAL LAW, 2, 3.

INFANTS.

1. DISAFFIRMANCE OF DEED OF MINOR AFTER ATTAINING MAJORITY. — Where a minor executes a deed of conveyance of land, and after attaining majority, conveys the same land to a third person, the second deed is a disaffirmance of the first. Such a deed may also be avoided by a suit in ejectment, and in such suit a petition which is in the ordinary form of an action of ejectment is sufficient. *Craig v. Van Beber*, 569.
2. INFANT MAY REPUDIATE CONTRACT WITHOUT RETURNING CONSIDERATION WHEN. — The rule that requires an infant who, upon coming of age, re-

repudiates a contract executed by him during his minority, and which has been in whole or in part executed by the adult party thereto, to return the property or consideration received, applies only where the infant has the property or consideration at the time he attains full age. If he has wasted or squandered it during infancy, he can repudiate the contract without making a tender thereof. *Id.*

3. UNPAID PURCHASE-MONEY NOT RECOVERABLE BY INFANT WHO REPUDIATES HIS DEED. — Where an infant, upon attaining his majority, repudiates his deed, he cannot recover the unpaid purchase-money. *Id.*
4. RATIFICATION OF MINOR'S DEED, CONDITIONAL OFFER TO CONVEY IS NOT. — An offer by an infant, after attaining full age, to make a deed ratifying a conveyance made by him during his minority, upon condition that the unpaid purchase price is paid or secured, is no evidence of a confirmation. *Id.*
5. DEED DISAFFIRMED BECAUSE OF MINORITY OF WIFE IS AVOIDED AS TO HUSBAND, who joined her in executing it. *Id.*
6. JUDGMENT UPON DEFAULT AGAINST INFANT more than fourteen years of age, after personal service of summons upon him, but without the appointment of a guardian *ad litem*, is erroneous and voidable, but not void. *Eisenmenger v. Murphy*, 493.
7. VOIDABLE JUDGMENT AGAINST INFANT — DUTY TO AVOID. — An infant with knowledge of an irregular and voidable judgment against him must move to avoid it within a reasonable time after attaining his majority; an unexcused delay of more than a year will bar his right. *Id.*
See NEGLIGENCE, 5, 10; PARENT AND CHILD, 1, 2; PROBATE COURTS.

INJUNCTIONS.

See EQUITY; JUDGMENT, 7; SPECIFIC PERFORMANCE, 2.

IN PARI DELICTO.

See FRAUD, 2, 3.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 19, 20, 22; NEGLIGENCE, 2, 4; TRIAL, 1-5.

INSURANCE.

1. INSURANCE COMPANY ESTOPPED FROM CLAIMING FORFEITURE FOR ACT OF INSURED PERMITTED BY ITS AGENT WHEN. — Where an agent of an insurance company, having authority to make and deliver policies of insurance, without referring the application to the company prior to the making and delivery of the policy, agrees with an applicant that she may encumber the property insured in a given amount, and that he will indorse the agreement upon the application, the company is estopped from claiming a forfeiture by reason of the insured having encumbered the property in the amount named, there being nothing in the policy limiting the power of the agent to make such an agreement. *Copeland v. Dwelling-house Ins. Co.*, 414.
2. INDIVISIBILITY OF POLICY. — Where property covered by insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject to destruction by the same fire, then, even though separate amounts of insurance are apportioned to each separate item or class of property, if the consideration for the contract and the

risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation which renders the policy void as to a part affects the other items in the same manner. *Geiss v. Franklin Ins. Co.*, 324.

3. **INDIVISIBILITY OF POLICY — UNINTENTIONAL FAILURE TO STATE TRUE TITLE.** — Where the validity of insurance is made to depend upon the assured being the absolute and unconditional owner of the true title to the property insured, a failure to set forth the true title with substantial accuracy renders the policy void, not only as to the property the title to which is not truly represented, but as to all other property covered by the same policy and subject to the same risk; and this even though the owner had no intention to deceive. *Id.*
4. **AMENDMENT OF DECLARATION INTRODUCING NEW CAUSE OF ACTION NOT ALLOWABLE.** — A declaration counting upon a written contract of insurance, and claiming damages for the breach of that contract in the failure or refusal of the defendant to pay the amount of the insurance upon a loss by fire, cannot be amended so as to claim damages for the refusal of the defendant to deliver a policy of insurance in conformity to a verbal agreement by which the plaintiff was deprived of the insurance upon his goods for which he contracted. These are two independent and distinct causes of action. *Connecticut F. Ins. Co. v. Kinn*, 398.
5. **MISTAKE CANNOT BE CORRECTED BY AMENDMENT IN COURT OF LAW WHEN.** — A declaration upon an insurance policy containing a clause "that there shall be a clear space of two hundred feet between staves and heading and mill" cannot be amended in a court of law so as to eliminate this clause, under an allegation that it was inserted either through mistake or fraud, and was never assented to by the insured. *Id.*

JUDGMENT BY DEFAULT.

See INFANTS, 6, 7.

JUDGMENTS.

1. **JUDGMENT AS ESTOPPEL.** — Where, in an action by a national bank to recover the principal and interest on a note, the defendant avails himself of the remedy against usury provided by the state law, and recovers judgment in his favor upon his answer and cross-petition without objection, and accepts the result, he is estopped from subsequently objecting to the jurisdiction and authority of the court to render the judgment, or from questioning its validity, to the extent of instituting another action under a United States statute for an additional recovery upon the same facts under which his former recovery was had. *Bollong v. Schuyler National Bank*, 781.
2. **ESTOPPEL BY.** — Judgment upon a cross-complaint determining that the defendant is not entitled to a specific performance of a contract to purchase real estate of him for the reason that such contract had been terminated by the failure of both parties to offer compliance therewith within the time designated therein does not estop the plaintiff from maintaining an action to recover moneys paid by him upon such contract. *Cleary v. Folger*, 187.
3. **JUDGMENT AS ESTOPPEL — DEFENSE CONDUCTED BY ONE NOT PARTY.** — One not a party to the action cannot be estopped, nor claim an estoppel, against the plaintiff by the judgment, on the ground that he is the real party in interest, and conducted the defense, unless he did so openly, to

the knowledge of the plaintiff, and for the defense of his own interest. *Cannon River Mfrs. Ass'n v. Rogers*, 497.

4. JUDGMENT AS RES JUDICATA. — Where, in an action to foreclose a mortgage, a junior mortgagee is made defendant, and, answering, sets up certain judgment liens and his mortgage, and prays for a decree foreclosing such liens, in response to which judgment is rendered in favor of plaintiff for the amount of his mortgage, and in favor of such junior mortgagees for the amount of his judgment liens, without mentioning his junior mortgage, such judgment, until reversed, is a bar to a subsequent action brought by such junior mortgagees to foreclose his mortgage. *Haines v. Flinn*, 785.
5. JUDGMENT AS ESTOPPEL. — When a judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit, or by evidence *aliunde* consistent therewith, that it was between the same parties, and that the particular controversy sought to be concluded was necessarily tried and determined. *Id.*
6. JUDGMENT AS RES JUDICATA — COLLATERAL ATTACK. — When a court has jurisdiction, it may decide every question which arises in the case, and whether its decision is correct or not, its judgment, until reversed, is binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. *Id.*
7. COLLECTION OF, WILL BE ENJOINED WHEN. — The voluntary acceptance by a creditor, after suit brought, of a sum of money less than the amount of his claim, in full settlement of the indebtedness and of the action, discharges both the debt and the costs, and his receipt in full may be pleaded in bar to the further maintenance of the suit; and if a judgment by default be afterwards taken against the debtor, the judgment so taken will amount to a fraud upon him, and its collection will be perpetually enjoined. The debtor's failure, under such circumstances, to appear and plead the receipt is not laches. *Gates v. Steele*, 268.
8. REVERSED JUDGMENT — RESTITUTION. — Money paid on a decree of court is not paid voluntarily, and upon its reversal, the party paying the money is entitled to restitution, regardless of the final determination of the rights of the parties. *Ex parte Walker*, 103.
9. MANDAMUS TO CHANCELLOR. — *Mandamus* will lie against a chancellor to compel him to make an order of restitution of money paid under his decree which has subsequently been reversed. *Id.*

JUDICIAL SALES.

See PROBATE COURTS.

JURISDICTION.

See CORPORATIONS, 27; PROBATE COURTS; RECEIVERS, 5, 12.

JURY.

See CRIMINAL LAW, 9, 10.

JURY TRIAL.

See CONSTITUTIONAL LAW, 1; TRIAL.

JUSTIFIABLE HOMICIDE.

See CRIMINAL LAW, 12-14.

KNOWLEDGE.

See FRAUD, 6-8.

LABORER.

See ATTACHMENT, etc., 3, 4.

LACHES.

See JUDGMENT, 7.

LANDLORD AND TENANT.

1. **LIABILITY OF LANDLORD FOR UNHEALTHFUL CONDITION OF LEASED PREMISES.** — The knowledge and concealment, on the part the landlord, of the polluted condition of the water of a well on the leased premises, existing at the time of leasing, renders him liable for all the damages naturally resulting to the tenant and his family from the use of such water, including expenses of sickness and physicians' and nurses' bills. *Maywood v. Logan*, 431.
2. **UNHEALTHFUL CONDITION OF LEASED PREMISES — RIGHT TO TERMINATE TENANCY.** — Where the water in a well on the leased premises, at the time of the leasing, is so polluted as to render its use unhealthful, and this fact is known and concealed by the landlord, its discovery by the tenant justifies him in removing from the premises and terminating the tenancy, if the cause of pollution cannot be removed, because it amounts to an eviction, after which the tenant is not liable for rent. *Id.*
3. **UNHEALTHFUL CONDITION OF LEASED PREMISES.** — The landlord must see that leased premises are in a healthful condition at the time of leasing, or at least disclose to his tenant any fact within his knowledge which tends to make such premises unhealthful and unfit for habitation. *Id.*
4. **ELEVATORS — TENANT'S LIABILITY FOR DEFECTIVE CONDITION OF.** — A tenant of a building in which a passenger-elevator is used by him in his business is bound to keep such elevator in a reasonably safe condition and in proper repair for the purposes for which it is used by his authority or direction, or by those entitled to use it; and he is liable for personal injuries received by his servant, who, while properly using it, is injured by reason of its unsafe condition and want of proper repair. *Oberfelder v. Doran*, 771.
5. **CONTRACT OF SALE IN NATURE OF LEASE — WAIVER OF PROMPT PAYMENT OF RENT.** — Under a contract of sale in the nature of a lease for a term, stipulating for the payment of rent at fixed periods, its prompt payment is waived, even if time is of the essence of the contract, by accepting it at other times, either before or after the time fixed upon for its payment. *Davis v. Robert*, 128.

LAPSE OF TIME.

See PAYMENT, 1-4.

LEASE.

See ADVERSE POSSESSION, 1; LANDLORD AND TENANT, 5; SPECIFIC PERFORMANCE, 3.

LEGITIMACY OF CHILDREN.

See MARRIAGE AND DIVORCE, 1.

LIBEL.

1. **ACTIONABLE WORDS AGAINST ACTOR.** — Published words are actionable which directly tend to the prejudice or injury of any one in his office, profession, trade, or business, and which, if true, would render him unworthy of employment. Hence a publication falsely accusing a professional actor of ungentlemanly and discourteous conduct is libelous. *Williams v. Davenport*, 519.
2. **QUESTION FOR THE COURT.** — In an action for libel, if the publication is conceded, and the words are unambiguous and admit of but one sense, the question of libel or no libel is one of law, which the court must decide, and which it must not leave to the jury. *Moore v. Francis*, 810.
3. **WORDS MAY BE LIBELOUS, THOUGH THEY DO NOT DEFAME A MAN IN THE ORDINARY SENSE,** or impute blame, moral turpitude, or even censure, as when they affect one in his business by imputing incapacity or unsuitness for its proper management. *Id.*
4. **A STATEMENT THAT A PERSON IS INSANE,** or that his mind is so seriously impaired as to disqualify him from attending to his business, is libelous. *Id.*
5. **PUBLICATION CONCERNING A TELLER IN A BANK, TO THE EFFECT THAT HIS MENTAL CONDITION IS NOT GOOD,** and that there had been trouble in the bank caused by his mental derangement, is libelous, though it attributes his alleged condition to overwork. *Id.*
6. **IT IS NO LEGAL EXCUSE THAT DEFAMATORY MATTER WAS PUBLISHED INADVERTENTLY,** or with good motives, and in the honest belief of its truth. *Id.*

LIEN.

See CHATTEL MORTGAGES, 3; ESTOPPEL, 4; LIS PENDENS; MECHANIC'S LIEN; VENDOR AND VENDEE, 3.

LIMITATIONS OF ACTIONS.

1. **NEW PROMISE, WHEN INSUFFICIENT.** — An annual statement made by the secretary of a municipality to the city council recognizing as valid bonds against the city which on their face are barred by the statute of limitations will not remove the bar of the statute, in the absence of evidence that the secretary had authority to make any acknowledgment or promise that would bind the city, or that the city council approved the statement, or in any way acknowledged the existence of the debt. *Houston v. Jankowskie*, 57.
2. **NEW PROMISE.** — An acknowledgment from which a new promise is to be implied which will remove the bar of the statute of limitations must be made by the debtor in writing, or by some person authorized to make it, and it must be made to the person holding the claim, or to some person acting for him. A promise or acknowledgment made to a stranger is not sufficient. *Id.*
3. **NEW PROMISE, WHEN NOT SUFFICIENT.** — The levy and collection of taxes by a city to meet interest due and create a sinking fund is not an acknowledgment of or new promise to pay any particular bond or issue of bonds which from their face are barred by the statute of limitations. *Id.*

4. NOTE ON WHICH DEMAND IS NECESSARY. — If a demand is a condition precedent to the right to sue, it must be made within a reasonable time, and that is, within the time limited by statute for the commencement of the action. *Kraft v. Thomas*, 345.

See HUSBAND AND WIFE, 4; NEGOTIABLE INSTRUMENTS, 4; PLEADING, 1.

LIS PENDENS.

PURCHASERS OF THE PROPERTY OF A CORPORATION DURING THE PENDENCY of an action for the forfeiture of its charter are not bound by an order entered in such action appointing a receiver and directing him to take possession of such property. The state does not by such an action acquire any lien upon the property of the corporation, nor any right to prevent it from disposing of its property in good faith. *Havemeyer v. Superior Court*, 192.

LOST BONDS.

See MUNICIPAL CORPORATIONS, 14, 15.

MALICE.

See CRIMINAL LAW, 21; MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

1. DECLARATIONS OF ARRESTING OFFICER AS EVIDENCE. — In an action of malicious prosecution for arrest without probable cause, the declarations of the arresting officer are inadmissible against defendant, in the absence of proof that the latter had given the former instructions. *Reisan v. Mott*, 489.
2. MALICE OF PRINCIPAL NOT IMPUTABLE FROM KNOWLEDGE OF AGENT. — In an action for malicious prosecution, actual malice cannot be conclusively presumed or legally imputed to the defendant as principal, from the knowledge of his agent. *Id.*
3. PRINCIPAL ACTING ON KNOWLEDGE OF AGENT. — A defendant in malicious prosecution is not liable as principal, if, acting on knowledge communicated to him by his agent, he institutes a criminal prosecution, in good faith, with due caution, believing that the offense has been committed, and acting upon grounds which justify that belief. *Id.*
4. IN MALICIOUS PROSECUTION, MALICE is a question of fact for the jury. *Id.*
5. CONDITION OF FAMILY AS EVIDENCE. — In an action of malicious prosecution, the condition of plaintiff's family is inadmissible in evidence to affect the amount of general damages to be awarded. *Id.*
6. EVIDENCE TO SHOW PROBABLE CAUSE. — In an action of malicious prosecution for an alleged fraudulent disposal of mortgaged property, evidence of the amount of property owned by the plaintiff is admissible, as bearing upon the question whether the defendant had reasonable ground to believe that plaintiff had disposed of the mortgaged property with intent to defraud. *Id.*

MANDAMUS.

See JUDGMENT, 9.

MARGINS.

See BROKERS, 1, 2.

MARKETABLE TITLE

See VENDOR AND VENDEE, 5, 6.

MARRIAGE AND DIVORCE

1. **MARRIAGE BETWEEN INDIANS — LEGITIMACY OF CHILDREN.** — Persons who belong to a tribe of Indians, and who are married and recognized as husband and wife by the custom and law of their tribe, must be treated as such by the courts, and their children regarded as legitimate, when the capability of the tribe to manage its own affairs, including its domestic relations, is recognized by the United States government. *Earl v. Godley*, 517.
2. **DIVORCE FOR MALFORMATION.** — Before the wife can be granted a divorce on the ground that her husband is physically incapacitated from entering into the marriage state by reason of his malformation and abnormal proportions, the proof should be satisfactory, and as direct as the nature of the question is susceptible of. The wife must submit to a skilled examination of her person, under order of court, to show that the fault is not with her; and the husband must also submit to such an examination, that the court may be satisfied that the proceeding is not consensive and collusive. Finding the latter to be the case, relief should be denied, except on clear proof of the charge preferred in the bill. *Anonymous*, 116.

MARRIED WOMEN.

See ESTOPPEL, 4, 5; HUSBAND AND WIFE, 1, 2.

MASTER AND SERVANT.

1. **SERVANT, WHEN IN EMPLOYMENT OF MASTER.** — A servant whose employment may require his services at any time during working-hours on his master's premises, and who is not authorized to leave them at will to attend to his private business, is not out of the employment of his master during working-hours until he is off of his premises. *Adams v. Iron Cliffs Co.*, 441.
2. **FELLOW-SERVANTS, WHO ARE — ASSUMING RISK OF EMPLOYMENT.** — An inside founder in a blast-furnace who has a separate department, and nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, and who has no control beyond his own work, is the fellow-servant of an engineer whose duty it is to run cars to and from such furnace, and in entering the employment assumes the risk that the cars may be handled negligently by such fellow-servant. *Id.*
3. **MASTER'S LIABILITY FOR NEGLIGENCE.** — The master is liable for negligence in the performance of duties he has impliedly contracted to perform toward his servant, no matter whether he attempts to perform them in person or by another; and the true test to determine whether the rule applies is to be found in the character of the act performed which causes the injury, and not in the rank, grade, or department of service of the person performing it. If there is a neglect of one of the duties the master has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it. *Galveston etc. R'y Co. v. Smith*, 78.
4. **FELLOW-SERVANTS — ROAD-MASTER AND SECTION-HAND.** — A road-master having charge of a working-train and its operatives, with power to em-

- ploy and discharge the men, is the fellow-servant of a section-hand riding on the train, and working under his direction, so as to prevent the section-hand from recovering damages from the company for an injury received in a collision caused by the road-master's negligence. *Id.*
5. **NEGLIGENCE OF SUPERINTENDENT NEGLIGENCE OF RAILWAY COMPANY.** — It is the duty of a railway company to give such information and orders to its servants in charge of its trains as will enable them to avoid collisions, and the neglect of the company's superintendent in this respect is the negligence of the company, and the doctrine of fellow-servants does not apply in case of injury to the train employees. *Id.*
6. **DUTY TO INFORM SERVANT OF EXTRA HAZARD AND DANGER.** — A brakeman ordered to couple cars of peculiar, unusual, and extra-hazardous construction, and with which he is entirely unacquainted, should be notified by the company of their unusual construction, and of the danger arising therefrom; and a failure to give such notice renders the company liable in damages for resulting injury to the brakeman. *Missouri Pacific etc. Ry Co. v. White*, 33.
7. **LIABILITY FOR UNAUTHORIZED ACT OF EMPLOYEE.** — The employees of a company operating a freight-boat, who are expressly forbidden to carry passengers upon it, have no authority to bind the company by contract to carry passengers. *Cook v. Houston etc. Co.*, 52.
8. **LIABILITY FOR UNAUTHORIZED ACT OF EMPLOYEE.** — Where a minor child is drowned through having been invited aboard a tug-boat by the servants of the owner, which act was outside their authority, and against express orders, no recovery can be had, if the right of action is made to depend upon the invitation of the owner. *Id.*
9. **LIABILITY OF MASTER FOR NEGLIGENCE OF SERVANT.** — Where the master of a tug-boat leaves the control and management, for a time, to his servants on board, the owner will be liable for their negligent act in allowing a minor child on the boat, and in a place of danger, although such act was contrary to the express orders of the owner. *Id.*
10. **ELEVATOR, EMPLOYEE RIDING IN, ASSUMES RISK OF CONSTRUCTION AND OPERATION WHEN.** — An employee of defendant familiar with the construction and operation of its elevator used in its business only for transporting material, who rides thereon under an implied license, for his own pleasure and convenience, accepts whatever risk is incident to such construction and operation, and can only require of the defendant the use of ordinary care in its operation. *O'Brien v. Western Steel Co.*, 536.
11. **KNOWLEDGE BY EMPLOYEE OF UNSAFE CONDITION OF APPLIANCE DOES NOT DEFEAT RECOVERY WHEN.** — The knowledge of a brakeman of the unsafe condition of the railroad track upon which he was killed will not defeat a recovery for his death, if it was not so dangerous as to threaten immediate injury, or if he might have reasonably supposed that he could safely work on it by the use of care and caution. *Soeder v. St. Louis etc. Ry Co.*, 724.

MECHANICS' LIENS.

MECHANIC'S LIEN LAW UNCONSTITUTIONAL WHEN. — A mechanic's lien law enacted for the sole purpose of enabling strangers to the title to land to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever, is unconstitutional, and leaves the law as it was before its passage. *John Spry Lumber Co. v. Sauls Savings Bank etc.*, 396.

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MINORS.

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MORTGAGES.

1. **SALE OR ASSIGNMENT OF RIGHT TO DISAFFIRM SALE AFTER PURCHASE BY MORTGAGEE UNDER POWER.** — Where a mortgagee has purchased at a sale under a power contained in a mortgage, without the consent of the mortgagor, the latter has a right, within a reasonable time, to disaffirm the sale, and ask for redemption and an account of the rents and profits; but if he takes no steps to disaffirm the sale, he cannot assign, sell, nor convey the land so as to vest in his assignee the right to disaffirm the sale, and redeem in his own name. *McCall v. Nash*, 145.
2. **PURCHASE AT SALE UNDER POWER.** — Where the mortgagee purchases at his own sale under the power contained in the mortgage, the sale is binding on him, and his only right or remedy is to apply in equity, if the mortgagor does not come in within a reasonable time to avoid the sale, to clear his title of doubt and uncertainty, by a confirmation of the sale, or a resale under order of court, as may appear equitable. *Id.*
3. **PURCHASE AT SALE UNDER POWER.** — A mortgagee purchasing at his own sale under the power in the mortgage acquires the beneficial interest of the mortgagor, subject to be defeated by his election to avoid the sale within a reasonable time, but as to the latter, the sale is not void, but voidable only, and is valid for all purposes, until he, or some one claiming under him, whose rights are injuriously affected, does some act legally sufficient to render it void. So long as there is no disaffirmance of the sale, the equity of redemption is cut off; and if there is no disaffirmance within a reasonable time, no further act is required to give validity to the sale, which acts as a foreclosure. *Id.*

See CHATTEL MORTGAGES; CORPORATIONS, 1-3; DREDA, 6, 7; HUSBAND AND WIFE, 4.

MUNICIPAL CORPORATIONS.

1. **WATER COMPANY, WHETHER ANSWERABLE FOR LOSS OF PROPERTY BY FIRE FROM ITS FAILURE TO PERFORM ITS CONTRACT.** — Where a city contracts with a water company for a supply of water to extinguish fires, such supply to be paid for by the levy of a special tax, there is no privity of contract between the tax-payer and such company authorising him to maintain an action against it for the destruction of his property by fire, caused by its failure to fulfill its contract. *Becher v. Keokuk Water-works*, 377.

2. **CONTRACT — PRIVILEGE.** — LEVY AND COLLECTION of a tax by a city, in discharge of a contract legally made by it, does not create any privilege of interest between the contractor and the tax-payer. *Id.*
3. **CONTRACT BY CITY TO INDEMNIFY PROPERTY-HOLDER.** — A law which authorizes cities to contract with individuals and companies for the building and operating of water-works does not, in the absence of express provision to that effect, confer power upon the city to contract with such individual or corporation to indemnify a tax-payer, so as to enable him to maintain an action in his own name for a breach of the contract. *Id.*
4. **MUNICIPAL CORPORATION, WHEN IT DOES PROVIDE WATERWAYS, MUST PROVIDE SUCH AS ARE SUFFICIENT** to carry off the water which may reasonably be expected to accumulate. *Spangler v. San Francisco*, 158.
5. **MUNICIPAL CORPORATION IS LIABLE FOR WATER PRECIPITATED UPON THE LANDS OF A PRIVATE PROPRIETOR** by an extraordinary and unusual rainfall, and the want of proper repairs in sewers constructed by the municipality, if such sewers, when in proper repair, were of sufficient capacity to carry off all the water which fell. Proper and sufficient sewers having been constructed, the land-owner had the right to assume that they would be repaired when broken or dilapidated. *Id.*
6. **CONTRIBUTORY NEGLIGENCE.** — A LOT-OWNER IS NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE because he does not repair or remove obstructions from a sewer which it was the duty of a municipal corporation to keep in proper repair. *Id.*
7. **THE FACT THAT A CITY LOT IS BELOW THE GRADE OF A STREET** will not preclude its owner from recovering compensation of the city for injuries to such lot and the improvements thereon, resulting from the failure of the city to keep a sewer in proper repair, if such sewer, when so repaired, would have prevented such injury, notwithstanding the lot was below the grade. *Id.*
8. **CONTRIBUTORY NEGLIGENCE IN BUILDING ON A LOT BELOW THE GRADE OF A STREET.** — When sewers already constructed by a city are sufficient, if kept in repair, to protect from injury improvements placed on a lot below the grade of the street, the lot-owner is not guilty of contributory negligence in erecting such improvements, and may therefore recover of the city if they and the lot are injured by its failure to keep such sewers in proper repair. *Id.*
9. **MUNICIPAL CORPORATIONS ARE LIABLE** where the property of private persons is flooded either directly or by water being set back, when this is the result of the negligent failure to keep gutters, drains, culverts, or sewers in repair and free from obstructions, whether the lots are below the grade of the street or not. *Id.*
10. **MUNICIPAL CORPORATION IS NOT RELIEVED FROM LIABILITY FOR DAMAGES** resulting from a sewer being broken or out of repair, by the fact that the water which caused the damage may have been diverted into the sewer by means of a dam built by persons who constructed another sewer for the city. Such persons act under the direction of the city authorities, and if their negligent mode of conducting their work causes loss to a third person, the city is answerable. *Id.*
11. **THERE IS NO NECESSITY FOR PRESENTING** to a board of supervisors or common council claims for damages for negligence in not keeping a sewer in proper repair, before bringing suit on such claim. *Id.*

12. **ENACTMENT OF CITY ORDINANCE PRECEDENT TO LIABILITY FOR FAILURE TO CONSTRUCT SIDEWALK WHEN.** — Where, by the provisions of a city charter, before a person owning land in the city can be required to build a sidewalk in front of or adjacent to his land, the council must pass an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be constructed, the enactment of such an ordinance is a condition precedent to any liability for failing to make such sidewalk. *Port Huron v. Jenkinson*, 409.
13. **PERSON CANNOT BE PUNISHED FOR FAILING TO DO ACT IMPOSSIBLE FOR HIM TO PERFORM.** — No legislative or municipal body has the power to impose the duty of performing an act upon any person which, from his poverty, it is impossible for him to perform, and then make his non-performance of such duty a crime punishable by fine and imprisonment. And therefore a city ordinance which requires all persons owning or occupying any real estate in the city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposes a fine or imprisonment for a failure to do so, and a charter provision authorizing such an ordinance, are both unconstitutional and void, because, under such ordinance, a tenant of property, though himself supported by charity, might become guilty of a crime in omitting to construct a sidewalk. *Id.*
14. **RECOVERY ON LOST BONDS OF.** — An action may be maintained against a city to recover the amount due on overdue lost negotiable bonds issued by it, if, after maturity, the owner demanded payment in due form, and offered approved indemnity to the city against loss on account of inability to present or return the bonds for cancellation. *Bloomington v. Smith*, 310.
15. **BONDS OF, WHERE PAYABLE.** — Municipal bonds drawn payable to bearer are negotiable as inland bills of exchange, and are payable at maturity only on presentation at the office of the city treasurer, or at the place where made payable. If lost before maturity, the owner may maintain an action to recover the amount due, after demand and offer of indemnity to the city against loss. *Id.*
16. **NOTICE OF MUNICIPAL ORDINANCE.** — Any person within a municipality who contracts, even by implication, with reference to a matter governed by its ordinance operating as a police regulation, is charged with notice of the provisions of such ordinance. *North Birmingham R'y Co. v. Calderwood*, 105.
17. **PURPOSE AND MEANING OF CITY ORDINANCES** cannot be extended by implication. *Anderson v. Minneapolis St. R'y Co.*, 525.
18. **PASSAGE OF ORDINANCE UNDER ST. LOUIS CHARTER.** — The provision of the charter of St. Louis requiring the presiding officer of each of the two houses of the municipal assembly to affix his signature to a bill in open session is mandatory; but other provisions thereof relating to mere matters of detail in the passing of ordinances are only directory, and it will be presumed that they were complied with, no objection being noted on the journal. *Barber Asphalt Paving Co. v. Hunt*, 530.
19. **ORDINANCE VALID, THOUGH NOT RETURNED TO HOUSE WHERE IT ORIGINATED, WHEN.** — Where both houses of the municipal assembly of St. Louis adjourned *sine die* on the day when an ordinance passed by them was presented to the mayor for his approval, such ordinance is not in-

valid because the mayor, after approving it, filed it in the city register's office instead of returning it to the house in which it originated. *Id.*

20. **WORK OF STREET PAVING COVERED BY PATENT, POWER OF CITY COUNCIL TO ORDER.** — A city council may order a species of street work covered by letters patent to be done, notwithstanding the charter of the city requires the board of public improvements to "let out said work by contract to the lowest responsible bidder, subject to the approval of the council." *Id.*

See CARRIERS, 19; CONSTITUTIONAL LAW, 1; SUNDAY.

MURDER.

See CRIMINAL LAW, 11 23.

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See PARENT AND CHILD, 1.

NEGLIGENCE.

1. **EVIDENCE THAT DEATH RESULTED FROM DEFECTIVE RAIL, WHAT SUFFICIENT TO GO TO JURY.** — In an action against a railway company to recover damages for the death of a brakeman, evidence showing that the deceased was engaged at night in switching cars of the defendant upon a track in which there was a defective rail, in passing over which a car would be jolted; that when last seen he was standing on the top of one of the cars in the discharge of his duties; and that his dead body was found in a condition and at a place consistent with the inference that he had been thrown from the top of the car by the jolting caused by its passing over the defective rail, and run over by the wheels of the car, — is sufficient to authorize the submission of the case to the jury, although no one witnessed the accident. And whether there was a substantial defect in the track caused by the defective rail, and whether the deceased was familiar with the track in question, are questions for the jury, as different conclusions might be drawn from the evidence thereon. *Soeder v. St. Louis etc. R'y Co.*, 724.
2. **JURY TRIAL.** — INSTRUCTION that if the jury found, from the evidence, that the defendant, through its agents, servants, and employees, fired and exploded a blast as charged by the plaintiff's complaint, and that it resulted in the death of the plaintiff's intestate, then that plaintiff is entitled to recover, is not erroneous, and does not remove from the jury the consideration of all questions except as to whether defendant fired the blast, if the complaint sets forth a careless and negligent explosion of the blast. *Munro v. Pacific etc. Co.*, 248.
3. **LIABILITY FOR EXPLODING A BLAST.** — When injuries are inflicted by exploding, in a thickly settled part of a city, a blast of gunpowder, the parties causing such explosion are not relieved from liability by the fact that they employed careful and experienced men, and exercised the highest degree of care. *Id.*
4. **JURY TRIAL.** — INSTRUCTIONS IGNORING THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE will not occasion a reversal, where there was no evidence of such negligence on the part of the person injured. *Id.*
5. **NEGLIGENCE TOWARD MINOR.** — It is negligence in the owner of a tugboat to permit a minor child to be aboard, where there is danger of its

- being drowned, without taking adequate precautions to avoid all accidents. *Cook v. Houston etc. Co.*, 52.
6. QUESTION OF PLAINTIFF'S NEGLIGENCE SHOULD BE SUBMITTED TO JURY, where the undisputed facts relied on to establish contributory negligence are such as may, in the judgment of sensible men, lead to different conclusions as to whether or not they establish want of care. *Weber v. Kansas City Cable R'y Co.*, 541.
 7. CONTRIBUTORY NEGLIGENCE IS ORDINARILY QUESTION OF FACT for the jury; but if it appears, without any conflict of evidence, from the plaintiff's own case, or from the cross-examination of his own witnesses, that he was guilty of negligence proximately contributing to produce the injury, it is the duty of the court to take the case from the jury *Id.*
 8. JUMPING OR STEPPING FROM MOVING CAR CONTRIBUTORY NEGLIGENCE WHEN. — Whether a party jumping or stepping from a moving car is guilty of negligence must depend upon other circumstances than the speed of the cars; but if the rate of speed is so high, and the place of descent so obviously perilous, that a person of ordinary prudence would not attempt to get off, the act is contributory negligence, and will bar a recovery. *Id.*
 9. CONTRIBUTORY NEGLIGENCE, PARTY GUILTY OF, WHEN. — Where a young man twenty years old, in the possession of his faculties, accustomed to cable-cars, knowing that they pass every few minutes, leaves his seat without signifying to the brakeman near him any desire to get off, and without any reason to believe that the cars would come to a halt, goes to the door of the car and jumps off while it is running at full speed, and is injured by an approaching train which he might have seen if he had looked for it, he is guilty of such contributory negligence as will bar a recovery. *Id.*
 10. CONTRIBUTORY NEGLIGENCE OF MINOR QUESTION FOR JURY. — The question of contributory negligence, capacity, intelligence, and discretion in a minor between thirteen and fourteen years of age should be left to the jury. *Cook v. Houston etc. Co.*, 52.
 11. CONTRIBUTORY NEGLIGENCE IS DEFENSIVE MATTER, and the burden of establishing it is ordinarily on the defendant. This rule does not apply when plaintiff's testimony, which seeks to fix negligence on the defendant, inculcates himself also. *North Birmingham R'y Co. v. Calderwood*, 105.
 12. CONTRIBUTORY NEGLIGENCE CANNOT BE INVOKED AS A DEFENSE unless it is a proximate cause of the injury. Still, it need not be the sole cause, as it is sufficient if it is one of two or more concurring efficient causes. *Id.*
 13. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT. — In an action against a street-car company to recover damages for injuries arising through its negligence, when it becomes a material issue whether the cars stopped on the east or the west side of the street, and the evidence on this question is conflicting, it should be left to the jury to determine, without any instructions to the effect that it is presumed that the cars stopped on the west side of the street, where, under an ordinance, they were required to stop. *Id.*
 14. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION OF FACT. — Where, in an action against a street-car company, its negligence is alleged, and the evidence shows that plaintiff's injury was received while attempting to alight from the defendant's car, but is conflicting as to which side of the

street the car was stopped at the time, the defendant being required by law to stop only on a certain side, and the evidence further showing that the conductor was not in his place at the time, and that the car stopped on the street in apparent response to the pulling of the bell-cord by plaintiff, who, reasonably believing that the stop was made to allow him to alight, attempted to do so, the question of his contributory negligence is one of fact to be determined by the jury. *Id.*

15. CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM MOVING TRAIN IS QUESTION OF FACT. — Whether or not a person who voluntarily alights from a moving railway train is guilty of negligence, is a question of fact to be determined by the jury, taking into consideration all the circumstances in connection with the alighting. *Pennsylvania Co. v. Marlon*, 330.
16. PRESUMPTION AGAINST CONTRIBUTORY NEGLIGENCE. — In a case where there is no eye-witness to an accident causing death, the presumption prevails, in the absence of evidence to the contrary, that the deceased used ordinary care and caution, and the presumption is sufficient to enable plaintiff to recover, upon showing negligence in the defendant. *Adams v. Iron Cliffs Co.*, 441.
17. CONTRIBUTORY NEGLIGENCE, WHEN QUESTION FOR JURY. — In an action where contributory negligence on the part of plaintiff is alleged, and under the facts shown there is a chance for different conclusions to be drawn by ordinarily candid and intelligent men, it is a question of fact to be determined by the jury. *Id.*

See ATTORNEY AND CLIENT, 1-5; CARRIERS, 19; DAMAGES, 1-6; MASTER AND SERVANT, 2-11; MUNICIPAL CORPORATIONS, 5-9; PLEADING, 1-3; RAILROAD COMPANIES, 6-8, 10-12; RECEIVERS, 8, 9, 13; WAREHOUSEMEN.

NEGOTIABLE INSTRUMENTS.

1. SALES — FRAUD OF VENDOR — REMEDY OF INNOCENT PURCHASER OF VOID NOTE. — The innocent purchaser of an illegal and void note warranted to him by the vendor to be good and valid may recover its value or the money paid for it from such false warrantor, and he need not collect it of the maker, though able to do so. *Evans v. Stuhrberg*, 435.
2. OMISSION OF NUMBER OF DOLLARS IN BODY OF NOTE — MARGINAL FIGURES. — In a written obligation, in form a negotiable promissory note, in which there is a promise to pay "dollars," but the number of dollars in the body of the instrument is blank, and the margin of the instrument contains a superscription which states the number of dollars, the figures found in the margin should be taken as the amount which the obligor intended to obligate himself to pay. *Witty v. Michigan Mut. Life Ins. Co.*, 327.
3. PROMISSORY NOTE — DEMAND — RIGHT OF ACTION. — An instrument in writing, worded, "October 15, 1864. For value received of C. P. Coleman, three hundred dollar, in full, with use or bearer, waivin valuation and appraisement laws. Paid when kald for. Edward Kraft," — is a promissory note payable, generally, on demand, and on which a right of action exists without demand. *Kraft v. Thomas*, 345.
4. PROMISSORY NOTE — DEMAND — STATUTE OF LIMITATIONS. — Where a promissory note is payable, generally, on demand, and on which a right of action accrues without demand, the statute of limitations runs against it from its date. *Id.*
5. NOTE MADE ON SUNDAY — RATIFICATION. — Although a note executed on Sunday is void, still a payment made on it on a secular day will be

- regarded as a ratification, and will make it valid from that day. *Russell v. Murdock*, 348.
6. **RATIFICATION OF ILLEGAL NOTE BY PARTNER — ESTOPPEL.** — One who alleges that he is the partner of another, who has ratified a void Sunday note by payment on a secular day, is estopped from denying the joint execution of the note, in order to effect the ratification. *Id.*
 7. **RATIFICATION OF ILLEGAL NOTE AND MORTGAGE BY JOINT MAKER.** — The ratification of a void Sunday note and mortgage made to secure the same, by a payment made by one of the joint makers on a secular day, operates as a ratification of both instruments as to all of the joint makers. *Id.*
 8. **CERTIFICATION OF CHECK BY HOLDER.** — The drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. It thus becomes, in his hands, a certificate of deposit, and by his own act he makes the bank his debtor, and releases the drawer. *Born v. First National Bank*, 312.
 9. **THE CERTIFICATION OF A CHECK,** when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank certifying it becomes bound. Beyond this nothing is added to the legal force or effect of the instrument. *Id.*
 10. **LIABILITY OF PARTY ACCEPTING CERTIFIED CHECK.** — One who accepts a certified check in the usual course of business is not bound to risk the solvency of the bank upon which it is drawn. He is bound only to promptly and seasonably present it for payment. *Id.*
 11. **ACCEPTANCE OF CHECK AS PAYMENT.** — The acceptance of a certified check instead of money, in the absence of an express agreement, only dispenses with the necessity of payment in the legal mode, and implies that the check is a payment only in the event that it is honored on presentation. *Id.*
 12. **CERTIFIED CHECK AS PAYMENT.** — To make the acceptance of a certified check operate as an absolute payment, there must be as agreement, express or implied, that it shall be regarded as money. *Id.*
 13. **CERTIFICATION DOES NOT RELEASE DRAWER.** — The mere certification of a check does not insure the solvency of the bank upon which it is drawn. Therefore one who takes such check in the ordinary course of business does not assume the risk of the solvency of such bank, but the drawer who selects for himself the bank which he will trust with his money assumes the risk of its solvency. *Id.*
 14. **CERTIFIED CHECK AS PAYMENT.** — The acceptance of a certified check does not, of its own force and vigor, operate as payment, nor *ipso facto* release the drawer, and impose upon the creditor the risk of the solvency of the bank certifying it. *Id.*
- See **LIMITATIONS OF ACTIONS**, 4; **MUNICIPAL CORPORATIONS**, 14, 15; **SALER**, 2; **SURETYSHIP**, 1.

NEW PROMISE.

See **LIMITATIONS OF ACTIONS**, 1-3.

NEW TRIAL.

WHEN MOTION FOR NEW TRIAL HAS BEEN MADE, entertained, and granted by the court, it is too late to object that the motion was not seasonably made. *Geiss v. Franklin Ins. Co.*, 324.

See **APPEAL AND ERROR**; **TRIAL**, 2, 3.

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See CHATTEL MORTGAGES, 1, 2; LIS PENDENS; MUNICIPAL CORPORATIONS, 16;
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SUNDAY.

PARENT AND CHILD.

1. DUTY OF PARENT TO SUPPORT MINOR CHILD. — It is the legal as well as the moral duty of parents to furnish necessary support to their children during minority; but a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same. Such promise may, however, be inferred on the grounds of the legal duty imposed. *Porter v. Powell*, 353.
2. FATHER'S LIABILITY FOR MEDICAL SERVICES TO EMANCIPATED MINOR CHILD. — A father whose daughter is at service away from home, under a limited emancipation, and controlling her own wages, is liable for the services of a physician called by her during a dangerous illness, although such parent has not furnished nor agreed to furnish her with means of support during emancipation, nor known of, consented to, or procured the services of such physician. He is liable for the services as necessities furnished the daughter. *Id.*

See MARRIAGE AND DIVORCE, 1.

PAROL EVIDENCE.

See DEEDS, 7.

PARTIES.

See CONTRACTS, 1.

PARTITION.

ALLOWANCE FOR IMPROVEMENTS. — A party who, owning an undivided one third in fee and a life estate in the whole of a tract of wild land, takes possession under a deed purporting to convey the remaining interest in

the fee, but which is afterwards determined to be void, and who, while thus in undisturbed possession for twenty years, makes improvements equal to the value of the land, is entitled, in an action of partition brought by him upon discovering the defect in his title, to recover the value of his improvements; and though actual partition cannot be decreed, and a sale must be made, still he need not resort to a court of law to recover the value of his improvements. *Killmer v. Wuchner*, 392.

PARTNERSHIP.

1. **WHAT IS.** — A partnership exists between two or more persons whenever there is such a relation between them that each is as to all the others, in respect to some business, both principal and agent. They are then partners in respect to that business, but not in respect to any other business. Partnership is but a name for this reciprocal relation. *Morgan v. Farrel*, 282.
2. **PARTNERSHIP, EVEN AGAINST INTENTION OF PARTIES, ARISES WHEN.** — A partnership as to third persons sometimes arises by operation of law, even against the intention of the parties, either because the contract into which they have entered in law makes each the principal and agent of the other, or because, by a course of dealing, they have shown that such was the real relation between them. *Id.*
3. **EXISTENCE OF PARTNERSHIP, WHEN QUESTION OF LAW.** — Where the terms of the agreement and the facts are all admitted, whether or not a partnership existed is a question of law. *Id.*
4. **MERE PARTICIPATION IN PROFITS OF BUSINESS DOES NOT CONSTITUTE PARTNERSHIP.** — A partnership, even as to third persons, is not constituted by the mere fact that two or more persons participate or are interested in the net proceeds of a business. Where, therefore, two persons enter into a contract with a patentee, by which the latter grants to them the exclusive right to make and sell a machine for which he holds a patent, and they agree to make one machine without expense to him, and run it for two months, and afterwards to make machines to supply orders, and to pay to him an amount equal to one half the gross profits of the business, such contract does not make them partners of the patentee; nor does it make them partners as between themselves, since it does not attempt to provide in what way they, as between themselves, are to carry out their joint undertaking. *Id.*
5. **LIABILITY OF PERSON HOLDING HIMSELF OUT AS PARTNER.** — The liability, as a partner, of a person who holds himself out as a partner, or permits others to do so, as to third persons who have given credit to the firm upon the faith of his connection with it, or who knew of such holding out, is predicated upon the doctrine of estoppel, and in order to charge him on that ground, it is not enough to show that he was represented by others to be a partner, or that his name appeared in the firm; it must be shown that he knew that he was being held out as a partner, and that he assented thereto, or facts must be shown from which assent can be fairly implied. And whether or not there has been such a holding out as to estop him from denying the partnership is always a question of fact. *Id.*
6. **NOTICE OF DISSOLUTION.** — A partner retiring from the partnership, in order to relieve himself from further liabilities incurred by the firm, must bring actual notice of his retirement, and of the dissolution of the partnership, home to such persons as have been accustomed to deal with it.

As to persons who had knowledge of the firm before its dissolution, but had not had dealings with it, general public notice given in any reasonable way will be sufficient. *Ellison v. Sexton*, 907.

7. NOTICE OF DISSOLUTION. — EVIDENCE TO PROVE SUFFICIENT NOTICE of the retirement of a partner from the partnership must be such as will reasonably warrant the jury in finding that the party to be charged had actual notice, or might, by reasonable diligence, have learned of the dissolution of partnership and retirement of the partner sought to be charged, from the means and opportunity supplied for the purpose of giving notice of the same; and this is generally a mixed question of law and fact, to be submitted to the jury under proper instructions. *Id.*
 8. NOTICE OF DISSOLUTION — INSUFFICIENT PUBLICATION. — A single publication of a notice of dissolution of partnership and the retirement of a partner, in a local newspaper, the circulation of which is mainly confined to the city in which the firm does business, is not notice to the general public of the dissolution of the partnership. *Id.*
- See CORPORATIONS, 10; NEGOTIABLE INSTRUMENTS, 6; TRADE-MARKS, 1, 4-7.

PARTY-WALLS.

Upon the destruction of buildings and of a party-wall between them, the mutual easements in such wall become inapplicable, and each proprietor may thereafter build as he pleases on his own land without any obligation to accommodate the other. *Heart v. Kruger*, 829.

PAYMENT.

1. PRESUMPTION OF PAYMENT ARISING FROM LAPSE OF TIME, or the rebuttal of such presumption, is a question of law, which, when the facts are established, the court must determine, and not leave to the discretion of the jury. *Alston v. Hawkins*, 874.
2. PAYMENT, PRESUMPTION OF. — When insolvency is relied upon to rebut the presumption of payment arising from lapse of time, the creditor must show that it existed during the entire statutory period next after the maturity of the debt. *Id.*
3. PAYMENT, REBUTTING PRESUMPTION OF. — Non-residence alone is not sufficient to rebut the presumption of payment arising from lapse of time. It is, however, competent, when connected with other circumstances, such as insolvency, as tending to rebut such presumption. *Id.*
4. PRESUMPTION OF PAYMENT — EVIDENCE TO REBUT. — Where the presumption of payment, arising from lapse of time, is the sole ground relied upon by the defendant, the evidence of a witness interested in the result of the action is inadmissible to rebut the presumption; otherwise, if actual payment is relied upon. *Id.*

See NEGOTIABLE INSTRUMENTS, 11-13.

PERISHABLE GOODS.

See CARRIERS, 3-6.

PERSONAL EXAMINATION.

See MARRIAGE AND DIVORCE, 2

PERSONAL LIBERTY.

See CONSTITUTIONAL LAW, 2, 3.

PETITION.

See PLEADING, 2.

PHYSICIANS AND SURGEONS.

See TELEGRAPH COMPANIES, 13; WITNESSES, 8.

PLEADING.

1. AMENDMENT OF COMPLAINT — STATUTE OF LIMITATIONS. — In an action against a carrier on a contract of carriage to recover for injuries to livestock arising from negligence in delivery to a connecting carrier, amendments to the complaint correcting a misdescription of the contract as to the agreed point of destination, or otherwise curing an imperfect statement of the same subject-matter, or adding new averments of facts more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the carrier has violated his duties growing out of his agreement embraced in the contract, should be allowed, and are not subject to the bar of the statute of limitations, if the action was commenced within the time designated by the statute. *Alabama Great S. R. R. Co. v. Thomas*, 119.
 2. VARIANCE BETWEEN ALLEGATIONS AND PROOF. — Allegations of a petition charging death from a negligent defect in the construction of an elevator in which the deceased was riding at the time of the accident are not supported by proof of death resulting from negligence in its operation. *O'Brien v. Western Steel Co.*, 536.
 3. CONTRIBUTORY NEGLIGENCE — VARIANCE BETWEEN PLEADINGS AND PROOF. — Where a city ordinance prohibits street-cars moving westward from stopping on the east side of the street, and those moving eastward from stopping on the west side of the street, either to receive or deliver passengers, and requires the cars to cross the street before stopping, a passenger moving westward who claims damages for an injury received from being thrown from the cars while in motion, through the failure of the defendant to stop them a sufficient length of time to enable him to alight in safety on the west side of the street, cannot recover, in the absence of negligence on the part of defendant, when the proof shows that the injury complained of was received on the east side of the street. *North Birmingham St. R'y Co. v. Calderwood*, 105.
- See CARRIERS, 18; EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCES, 1; INSURANCE, 4, 5; VENDOR AND VENDEE, 7.

POWER OF ATTORNEY.

See AGENCY, 1.

PRESUMPTIONS.

See CARRIERS, 6; CORPORATIONS, 2; CRIMINAL LAW, 15; EVIDENCE, 7; FRAUD, 1; PAYMENT.

PRINCIPAL AND AGENT.

See AGENCY.

PRIVILEGED COMMUNICATIONS.

See WITNESSES, 8.

PRIVITY.

See MUNICIPAL CORPORATIONS, 1, 2.

PROBATE COURTS.

PROBATE COURT HAS NO JURISDICTION TO APPROVE SALE OF REAL ESTATE OF MINOR, made for less than three fourths of its appraised value; and a deed thereof showing that it was sold for less than three fourths of its appraised value is void on its face. *Carder v. Oulbertson*, 548.

PROHIBITION.

1. WRIT OF PROHIBITION MAY ISSUE AFTER A RECEIVER HAS BEEN APPOINTED, if the court had no authority to make such appointment. The writ operates upon the court, and thereby affects its receiver, who is its officer. *Havenmeyer v. Superior Court*, 192.
2. WRIT OF PROHIBITION STAYS ALL PROCEEDINGS OF THE COURT WHICH ARE NOT COMPLETED AND ENDED; and if necessary to afford complete and adequate relief, what has been done will be undone. *Id.*
3. WRIT OF PROHIBITION, WHERE ANYTHING REMAINS TO BE DONE BY THE COURT, not only prevents what remains to be done, but gives complete relief by undoing what has been done. Hence if a receiver has got possession of property under a void judgment or order, and a writ of prohibition afterwards issues to the court, the effect of the writ is to require the receiver to restore such possession to the party from whom it was taken. Otherwise the prohibition would be worse than no remedy at all. *Id.*
4. WRIT OF PROHIBITION CANNOT BE DENIED MERELY BECAUSE THE APPLICANT might have moved the court to set aside the invalid order or judgment. *Id.*
5. WRIT OF PROHIBITION MAY ISSUE THOUGH THERE IS A REMEDY BY APPEAL, if that remedy is not adequate, as where a court, without authority to do so, appointed a receiver and directed him to take possession of property, and then determined that no appeal could operate to stay proceedings or to divest the receiver of the right to take possession of such property. *Id.*
6. THOUGH THE WRIT OF PROHIBITION DOES NOT ISSUE TO TRY TITLE TO PROPERTY, yet if a court by its order takes property out of the possession of a stranger to the proceedings, who claims it as his own, the order is in excess of its jurisdiction, irrespective of the actual state of the title, and the writ of prohibition will issue to annul such order. *Id.*
7. WRIT OF PROHIBITION IS NOT TO BE REFUSED WHEN DEMANDED BY A real party in interest bringing himself clearly within the law. The court has no right to refuse the writ on the ground that such party is a bad man, and deserves the punishment he is threatened with, nor upon any other consideration which appeals to the mere discretion of the court or judge. *Id.*
8. WRIT OF PROHIBITION. — The jurisdiction of the court to grant a peremptory writ of prohibition may be exercised, though it does not appear, either by averment or proof, that the applicant therefor, before filing his petition for the writ, had pleaded to the jurisdiction of the subordinate court, and that his plea had been overruled. The rule of practice adopted by the supreme court of California is, that this writ will not be issued until the objection to its want or excess of jurisdiction has, in some form, been made in and overruled by the lower court. *Id.*

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLICATION.

See LIBEL, 5, 6.

PUNISHMENT.

See CORPORATIONS, 17-19.

QUITCLAIM DEEDS.

See DEEDS, 4, 5.

QUO WARRANTO.

See CORPORATIONS, 4-17.

RAILROAD COMPANIES.

1. DUTY TO KEEP PLATFORMS IN REPAIR. — Railway companies are bound to keep the platforms of their passenger stations in a safe condition for persons to enter and leave the cars. A failure to do so is a neglect of duty for which the company is liable to persons injured, without fault on their part, on account of such defective platform. *Pennsylvania Co. v. Marion*, 330.
2. DUTY TO KEEP PLATFORM IN REPAIR— NEGLIGENCE. — Where a railroad company has allowed its passenger platform to become and to remain out of repair, so that it can only be used by careful attention to its structure, and if inattention to its actual condition imperils the safety of passengers, the railroad company is guilty of negligence in knowingly suffering it to remain in such condition. *Id.*
3. DEFECTIVE PLATFORM — DUTY OF PASSENGER. — Although a passenger may have previously known of the defective condition of a railroad platform, he is not bound to keep such knowledge actually in mind; and if at the time of stepping from a train upon such platform he knows of its condition, still he is not required to abandon its use, and seek some other place of approaching or leaving the train; and if in so using it, as he is invited to do by the company, and exercising proper care proportioned to the apparent condition of the platform, he is injured by reason of its defects, he is not guilty of contributory negligence so as to bar a recovery for the injury sustained through the negligence of the company. *Id.*
4. EXCLUSIVE DEPOT PRIVILEGES — RAILWAY COMPANY MAY NOT GRANT. — A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity and not discrimination in its requirements; and the grant by a railway company of a special privilege to a portion of the platform at its station to one hackman, to the exclusion of all others, is not such a rule or regulation as a common carrier has the right to adopt under its power to make and enforce all reasonable rules and regulations necessary to govern persons coming to its stations and platforms. *Montana etc. R'y Co. v. Langlois*, 745.
5. RAILWAY COMPANY CANNOT GRANT EXCLUSIVE RIGHT TO PLATFORM AT ITS STATION. — Under the constitution of Montana, which provides that

"no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company between persons or places within the state," a railroad company cannot grant to one person the special right to use a portion of its depot platform to deliver passengers departing and to receive and solicit the patronage of passengers arriving, to the exclusion of all other persons desiring to exercise the same right. *Id.*

6. NEGLIGENCE IN REGARD TO CROSSINGS. — It is the duty of a railroad to so construct and maintain its crossings that they may be safely used by persons traveling the highway; and for the negligent breach of this duty it must answer in damages to one injured thereby while exercising ordinary care. *Terre Haute etc. R. R. Co. v. Clem*, 303.
7. PRESUMPTION OF NEGLIGENCE which prevails against the company in cases of injuries to passengers while on a train does not prevail in actions for injuries received at railroad crossings. *Id.*
8. NEGLIGENCE. — EVIDENCE OF REPAIRS MADE after an injury has been sustained is incompetent to show antecedent negligence on the part of a railroad company. *Id.*
9. DUTY AS TO CROSSINGS. — Due but not extraordinary care is all that is required of railroads in regard to keeping their crossings in a safe condition for travel, and in case of accident, the question whether due care was or was not used must be determined by the precedent facts and attendant circumstances, and not from what subsequently occurs. *Id.*
10. STREET-RAILWAY'S LIABILITY FOR NEGLIGENCE, WHEN A QUESTION FOR JURY. — It is the duty of a street-car driver, who also acts as conductor, and has exclusive charge of the car, to sit or stand where he can have such control of his team and car as is practicable. He must be in a place and condition to exercise a reasonable degree of care and diligence in watching and observing the street ahead of him, so as to prevent collisions, and avoid injury to pedestrians lawfully traveling thereon, whether children or adults; and in case of injury to a small child through his alleged negligence, it is for the jury to determine, under all the circumstances, whether, had he been exercising due care and caution, he would have seen the child in season to have stopped the car, and thus have avoided the accident. *Anderson v. Minneapolis St. R'y Co.*, 525.
11. STREET-RAILWAY'S LIABILITY FOR NEGLIGENCE. — Although a street-car driver, who is also conductor, and has exclusive charge of the car, is performing his duty to his employer at the time of an accident in making change for a passenger at a time when he should have been watchful of the rights and careful of the safety of pedestrians, this fact will not relieve the employer of negligence when, had the driver's attention not been engrossed by the duty imposed by his employer, he could have avoided the accident. The duty which the car company and its employer owe to the public is paramount to that which they owe to each other. *Id.*
12. STREET-RAILWAY COMPANY'S LIABILITY FOR NEGLIGENCE. — EVIDENCE. — In an action against a street-car company to recover for injuries to a child, arising through defendant's alleged negligence, where it is shown that at the time of the accident the car causing it was under the exclusive control of a driver, who also acted as conductor, evidence is admissible to show that, at that time and previous thereto, cars upon that line were habitually crowded with passengers, as this suggests the duty, on

the part of the company, to employ conductors to relieve the drivers, and thus avoid accidents. *Id.*

See CARRIERS, 9-14; EVIDENCE, 1; MASTER AND SERVANT, 3-6; NEGLIGENCE, 1, 6, 9, 11-14; RECEIVERS, 1-15; TAXATION.

RATIFICATION.

See CORPORATIONS, 1; INFANTS, 4; NEGOTIABLE INSTRUMENTS, 5-7; SALES, 2.

RECEIVERS.

1. **RECEIVER OF RAILWAY.** — A receiver empowered to take possession of, control, and operate a railway is, in some sense, the representative of the corporation that owns it. *Howe v. Harding*, 17.
2. **OBLIGATION TO ENFORCE CONTRACTS.** — The court appointing a receiver for a railway corporation is under obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the company, though they may have been improvidently made. The continuance of the obligations of contracts is not dependent on the act or will of a court; nor can a court, in any proper case, refuse to execute them. *Id.*
3. **SUIT AGAINST — OBLIGATION OF CONTRACTS.** — A creditor having a specific right to be paid out of the earnings of a railroad, or a lien on its property in the hands of a receiver, based on a contract made with the company before his appointment, may maintain his action against the receiver; and upon recovering judgment, may have it satisfied out of the earnings of the road or the proceeds of sale of the property. *Id.*
4. **RECEIVER OF RAILWAYS — SUIT AGAINST — OBLIGATION OF CONTRACTS.** — Where a railroad company, in consideration of the grant of a right of way, agrees, with the grantor, for the erection of a water-tank on his land, for the use of the company, to be furnished with water from a spring on his land, and contracts to pay him therefor, a lien to secure the payment exists on the earnings of the road in the hands of a receiver afterwards appointed; and an action for a breach of the contract will lie, and judgment may be recovered against the receiver, to be satisfied out of the earnings of the road. *Id.*
5. **RECEIVER OF RAILWAY — EFFECT OF DISCHARGE OF — ORDER OUTSIDE OF JURISDICTION.** — The discharge of a receiver by the court appointing him, and the return of the property to the owner, ends the jurisdiction of the court, and it has no right, in the decree of discharge, to order that the property shall be relieved from liability for claims not established by intervention in that court within a time shorter than that fixed by law, so as to affect such owner's liability for injuries arising from the receiver's negligence, especially where the owner has received in improvements earnings out of which the injured party is entitled to have his damages paid, although his claim is not established by intervention within the time fixed by the order of court. *Texas P. R'y Co. v. Johnson*, 60.
6. **EFFECT OF DISCHARGE OF, ON CLAIMS AGAINST THE PROPERTY.** — The discharge of the receiver, and return of the property to the owner, leaves the property subject to any claim or charge legally resting upon it; and this may be enforced, through appropriate process, by any court having jurisdiction. *Id.*

7. **ESTABLISHMENT OF CLAIM AGAINST PROPERTY AFTER DISCHARGE — VOID ORDER.** — When at the time a receiver is discharged, and the property returned to the owner, there is a valid claim existing against it, the time within which such claim must be established cannot be arbitrarily fixed by order of the court granting the discharge. Such time is fixed by statute, except in cases where, from long lapse of time, equity is authorized to refuse to enforce the claim. *Id.*
8. **LIABILITY FOR NEGLIGENCE.** — A receiver having control of a railway is liable for injuries received by an engineer who, without fault on his part, is injured through the negligence of the receiver in using defective appliances on the road. *Id.*
9. **VERDICT AGAINST, FOR NEGLIGENCE NOT EXCESSIVE.** — A verdict of fifteen thousand dollars against a receiver controlling a railway, for injuries to an engineer in his employ, and arising from his negligence, is not excessive, where the engineer is in the prime of life, earning from \$165 to \$195 per month, and is injured permanently, so as to be incapacitated to perform any useful or profitable labor, and rendered deaf. *Id.*
10. **RECEIVER OF RAILWAY — LIABILITY FOR ACTS OF.** — Although charged with a duty to the public which must be discharged through the use of its property, still, in the absence of a statute so providing, a railway company is not liable for the acts of a receiver having charge of its property by reason alone of his relation to it. *Id.*
11. **LIABILITY FOR ACTS OF, WHEN COLLUSIVELY APPOINTED.** — Where a receiver is appointed for a railway company, through collusion with it and a portion of its creditors, for the purpose of placing, for a time, its property beyond the reach of another class of its creditors, it is liable for his acts while in control of the property. *Id.*
12. **LIABILITY FOR ACT OF, WHEN ACTING WITHOUT JURISDICTION.** — Where a railway company permits its property to remain in the hands of a receiver appointed by a court having no jurisdiction over its property, it is liable for his acts while in control of the property. *Id.*
13. **LIABILITY FOR NEGLIGENT ACTS OF.** — A claim for damages caused by injuries inflicted through the negligence of a receiver while he is operating the road is entitled to payment out of the current receipts. *Id.*
14. **LIABILITY FOR CLAIM WHICH RECEIVER SHOULD HAVE PAID.** — Where the earnings of a railway in the hands of a receiver are invested in betterments, which, without sale, are returned to the company, with its other property, at the close of the receivership, the company is liable for the satisfaction of any claim which the receiver ought to have paid out of the earnings. *Id.*
15. **RECEIVER HAS NO RIGHT TO TAKE PROPERTY FROM THE POSSESSION OF A STRANGER TO THE ACTION;** and an order directing him to take possession of specific property does not justify him in taking it from one claiming title paramount to that of the parties to the action. *Havemeyer v. Superior Court*, 192.
16. **COUNSEL FEES OF ATTORNEY FOR RECEIVER — LIABILITY OF RECEIVER OF.** — When a receiver employs counsel, the court will determine the amount to be allowed them as compensation for their services to the receiver. And if a receiver employs an attorney, and pays him a certain amount for his services, and inserts that amount in his account, upon the filing of which he notifies the attorney to be present at the settlement of the account and be heard as to the amount to be allowed to him for his services, and if the attorney attends and is heard on the matter, but

the court refuses to allow any more than the amount paid by the receiver, the attorney is bound by this adjudication, and cannot afterwards maintain an action to recover anything more from the receiver. *Walek v. Raymond*, 264.

17. **FOREIGN RECEIVER — RIGHTS AS AGAINST NON-RESIDENT ATTACHING CREDITORS.** — The rights of non-resident attaching creditors are paramount in the courts of the state where the attachment is sued out, to those of a receiver who was appointed by the court of another state, and whose appointment antedates the issuance of the writ of attachment. *Callin v. Wilcox Silver Plate Co.*, 338.
 18. **FOREIGN RECEIVER'S POWER IS ONLY CO-EXTENSIVE** with that of the court appointing him, and while that court may authorize him to take possession of property in a foreign jurisdiction, the appointment can confer no legal power which he can exert over such property, without the aid of the court in whose jurisdiction it is found. *Id.*
 19. **FOREIGN RECEIVER MAY INVOKE AID OF FOREIGN COURT** in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who are parties to, or in some way in privity with, the proceedings in the course of which his appointment was made, or who are in the possession of the property or fund to which the receiver has a right, and not against creditors of a non-resident debtor, who are seeking to subject the property or funds to the payment of their debts, by proceedings duly instituted for that purpose. *Id.*
 20. **FOREIGN RECEIVER HAS AUTHORITY ONLY CO-EXTENSIVE** with the court appointing him, when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor, which the receiver has not reduced to possession. *Id.*
 21. **FOREIGN RECEIVER — EFFECT OF INVOLUNTARY ASSIGNMENT TO.** — An assignment to a receiver under compulsion of law is involuntary and ineffectual beyond the jurisdiction in which it is made, when in conflict with the interests of citizens in a foreign jurisdiction; and as against non-resident creditors in such jurisdiction, the assignment confers no additional or higher right to property there situated than the receiver had by virtue of his appointment. *Id.*
 22. **FOREIGN CREDITORS IN ATTACHMENT.** — The rights of a foreign creditor against the property of the debtor within the jurisdiction are the same as those of resident creditors so far as respects proceedings in attachment and garnishment, in the absence of statute to the contrary. *Id.*
- See CORPORATIONS, 11, 14, 15, 19; ESTOPPEL, 1; LIS PENDENS; PROHIBITION, 1-8.

RECORDING.

See CHATTEL MORTGAGES, 1, 2; CORPORATIONS, 3.

RECOUPMENT.

See VENDOR AND VENDEE, 7.

REGISTRATION.

See ELECTIONS, 6-12.

RELEASE.

See ESTOPPEL, 5.

REPRESENTATIONS.

See AGENCY, 3.

RESERVATIONS.

See DEEDS, 1, 3; VENDOR AND VENDEE, 6.

RESISTING OFFICERS.

See CRIMINAL LAW, 24, 25.

RES JUDICATA.

See JUDGMENT, 4, 6.

RESTITUTION ON REVERSAL.

See JUDGMENT, 8, 9.

RESTRAINT OF TRADE.

See CONTRACTS, 4; CORPORATIONS, 19.

RULES OF COURT.

See APPEAL AND ERROR, 4.

SALES.

1. **SALE OF MACHINERY — WARRANTY — BREACH OF CONDITIONS.** — Damages cannot be recovered by the buyer for a breach of warranty in the sale of machinery when he has failed to give notice of the failure of the machinery to fill the warranty within the time prescribed by the contract of sale, and has continued in its possession and use after the term prescribed for its return, especially when by the terms of the contract this operates as conclusive evidence of the fulfillment of the warranty to the satisfaction of the buyer. *Russell v. Murdock*, 348.
2. **SALE CONDITIONED UPON SETTLEMENT — RATIFICATION OF ILLEGAL NOTE.** — Where a contract for the sale of machinery provides that the title thereto shall not pass until a settlement is concluded and accepted by the seller, a ratification of an illegal note and mortgage given for the purchase price, by a partial payment made thereon, is equivalent to the settlement contemplated, and upon such ratification the title passes to the purchaser, so as to enable the seller to maintain his action to recover the remainder of the purchase price. *Id.*
3. **NO FORM OF WORDS IS ESSENTIAL TO CONSTITUTE EXPRESS WARRANTY** in the sale of chattels. *Kircher v. Conrad*, 731.
4. **WARRANTY, WORDS WHICH DO NOT AMOUNT TO.** — The plaintiff applied to defendants' agent in charge of their store to purchase some wheat, saying that he wished to buy spring wheat for seed. One of the defendants told him that they did not know whether the wheat they had for sale was spring or winter wheat, but said he would write and ascertain. Subsequently the plaintiff called at the store, and inquired of the agent in charge if they had received an answer. He said: "We have. It is spring wheat." On being asked if he was sure it was spring wheat, he replied: "What do you take me for?" These words were held not to amount to a warranty that the wheat was spring wheat. *Id.*

6. **EXPRESS WARRANTY, POWER OF AGENT TO GIVE.** — The clerk of a store-keeper, in charge of his principal's business, has power under his employment to make an express warranty of the quality of grain sold by him. *Id.*
6. **CAVEAT EMPTOR, RULE OF, APPLIES WHEN.** — In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the maxim of *caveat emptor* applies. *Id.*
7. **INSOLVENCY OF PURCHASER — FRAUD.** — Where the supposed solvency of the purchaser is a material inducement to a sale of goods, and he makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies in effecting the sale, the latter may rescind it as fraudulent, without proof that the purchaser did not intend to pay for the goods when he bought them. *Reid v. Cooveroy*, 359.
8. **FRAUD BY VENDOR — WHERE A BOND IS FALSELY REPRESENTED** by the vendor as belonging to a certain known kind, and has nothing in its general looks to raise suspicion, and is purchased honestly on such recommendation, it is a fraud to so transfer it, and upon discovery of its worthlessness, the purchaser may maintain an action to recover the money paid for it, although he did not read it carefully before purchasing. *Ripley v. Case*, 428.

See MORTGAGES, 1-3; NEGOTIABLE INSTRUMENTS, 1.

SELF-DEFENSE.

See CRIMINAL LAW, 12-14.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 12, 13.

SKILL.

See ATTORNEY AND CLIENT, 1-5.

SOCIETIES.

See VOLUNTARY ASSOCIATIONS.

SPECIFIC PERFORMANCE.

1. **CONTRACTS FOR PERSONAL SERVICE, SPECIFIC PERFORMANCE OF, NOT DEMAND WHEN.** — Courts of equity will not undertake to enforce the specific performance of a contract for personal services which are material or mechanical, and not peculiar or individual; but where the contract stipulates for special, unique, or extraordinary personal services, or where the services to be rendered are purely intellectual and individual in their character, the courts will grant an injunction in aid of a specific performance. *William Rogers Mfg. Co. v. Rogers*, 278.
2. **INJUNCTION IN AID OF SPECIFIC PERFORMANCE OF CONTRACT FOR PERSONAL SERVICES NOT GRANTED WHEN.** — The defendant agreed to serve the plaintiffs for twenty-five years under the direction of their general manager, traveling for them, and rendering such services as secretary or other officer as such manager should devolve upon him, and that he would not be engaged in or allow his name to be used in any manner in any other hardware, cutlery, flat-ware, or hollow-ware business, either

as a manufacturer or seller, but would give his entire time and services to the interests of the plaintiffs. The plaintiffs brought suit for an injunction to restrain the defendant from leaving their employment, and engaging in any other hardware, cutlery, flat-ware, or hollow-ware business, or allowing his name to be used in any such business, and set out the defendant's contract, averring that his services had, by reason of his familiarity with their business and customers, become of special value to them; that he was planning with certain competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; that he intended to use for their advantage his knowledge of the business of the plaintiff; and that his doing so would cause irreparable injury to such business. On demurrer to the complaint, it was held, — 1. That it did not appear that the services were purely intellectual, special, unique, or extraordinary, or so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning; 2. That it did not appear that the plaintiffs had a right to use the defendant's name as a trade-mark; 3. That it did not appear that the use of the defendant's name as a stamp by the plaintiffs' competitors would do them any injury other than such as might grow out of a lawful business rivalry; and that if by reason of extraneous facts the name of the defendant did have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals did them some special injury, such facts ought to have been set out, so that the court might pass upon them; 4. That no facts were shown to bring the case within the rule that an employee should be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. *Id.*

3. SPECIFIC PERFORMANCE OF COVENANT FOR DEED IN CONTRACT OF LEASE — CONSIDERATION — MUTUALITY. — A contract of sale in the form of a lease for land for a certain term for a fixed rent, covenanting on the part of the lessor, if the rent is paid at the time fixed, to execute to the lessee "a good and sufficient deed to said land, as a free gift, without any charge or compensation from him," is supported by a valuable consideration as an agreement to convey, is not void for want of mutuality, and will be specifically enforced, at the request of the lessee or vendee, at the expiration of the term, upon proof of the payment of the rent as agreed upon. *Davis v. Robert*, 126.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

CONSTRUCTION OF STATUTE. — Before a clause of a code or statute should be construed contrary to its obvious meaning, it must certainly appear that such construction is necessary to prevent a conflict with some other provision of controlling force, or some legal principle of general application. *Hawmeyer v. Superior Court*, 192.

See DAMAGES, 2; ELECTIONS, 1-12; MECHANIC'S LIEN.

ST. LOUIS CITY.

MUNICIPAL CORPORATIONS, 18-20.

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STAY OF PROCEEDINGS.

See CORPORATIONS, 15.

STOCK-BROKERS.

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See CORPORATIONS, 1, 9, 24-26.

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STREET RAILROADS.

See PLEADING, 3; RAILROAD COMPANIES, 10-12.

STRIKES.

See CARRIERS, 8.

SUBPENA.

See ELECTIONS, 18.

SUNDAY.

1. **SUNDAY LAWS — CONSTITUTIONALITY OF ORDINANCE.** — A city ordinance prohibiting all persons from engaging in certain kinds of business on the day known as Sunday, and excepting from its operation persons engaged in certain other kinds of business of necessity on that day, is not void as discriminating against one class of persons and as extending to another class privileges and business advantages over competitors and others engaged in business within the city. *Lieberman v. State*, 791.
2. **CONSTRUCTION OF SUNDAY ORDINANCE.** — Where a city ordinance prohibits all persons from engaging in certain kinds of business on the day known as Sunday, but excepts from its operation those who conscientiously observe the seventh day of the week as the Sabbath, the fact that a person believes the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception. *Id.*

See NEGOTIABLE INSTRUMENTS, 5-7.

SURETYSHIP.

1. **SURETY NOT DISCHARGED WHERE CREDITOR RESERVES HIS RIGHTS AGAINST HIM.** — Where the holder of the notes of an insolvent corporation, indorsed by a third person, signs a composition deed by which the creditors assign their claims to a reorganizing committee, and agree to take in payment the stock of the reorganized company, but upon signing the deed adds a reservation of all rights against the indorser, the latter will not be discharged from his liability as surety. *Rockville Nat. Bank v. Holt*, 293.
2. **SURETY KNOWING AND ASSENTING TO EXTENSION OF TIME OR NEW CONTRACT NOT DISCHARGED.** — A surety who knows that a creditor has given time to or made a new contract with the principal debtor, and assents to such new contract, is not discharged by the giving of the time or by the making of the new contract. *Id.*

TAXATION.

ROLLING-STOCK OF FOREIGN RAILROAD COMPANY passing across the state for the purpose of interstate commerce is not subject to taxation in that state. *Bain v. Richmond etc. R. R. Co.*, 912.

See MUNICIPAL CORPORATIONS, 2.

TELEGRAPH COMPANIES.

1. **DECLARATION OF OPERATOR AS EVIDENCE.** — In an action against a telegraph company for damages arising from delay in delivering a message, the reply of the operator at the terminal office, in response to the inquiry of the sender why the message had not been delivered, is not admissible in evidence against the company. *Western Un. Tel. Co. v. Henderson*, 148.
2. **DAMAGES FOR FAILURE TO DELIVER MESSAGE.** — A recovery in damages may be had against a telegraph company for mental suffering resulting from a failure to deliver with diligence a message announcing the sickness or death of a relative, provided the language employed in the message is reasonably sufficient to put the company upon inquiry as to the relationship between the sender and the person addressed, and to apprise the company that the object of the message is to afford the party an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death. *Western Un. Tel. Co. v. Moore*, 25.
3. **NOTICE FROM FACE OF MESSAGE — DAMAGES FOR NON-DELIVERY.** — A dispatch in the words "Billie is very low; come at once," sent by a sister to her brother, and relating to another brother, is sufficient, on its face, to give the telegraph company notice of its object, and of the relationship between the parties, and to render it liable in damages for mental suffering caused by a failure to deliver the message promptly. *Id.*
4. **NOTICE FROM FACE OF MESSAGE.** — A telegraph message worded "C. S. Kirkpatrick, Highland Station: Come on first train. Bring Ferdinand. His father very low. Signed, Jerry Lordon," — does not, upon its face, apprise the company that the person addressed had a wife at the place named, or that its object was to afford information upon which she was expected to act, and hence cannot be made the basis of a recovery of damages for her mental suffering caused by delay in its delivery. Nor does the fact that the receiving agent knew the relationship between the parties affect the case, as there is nothing in the message to indicate that it was sent for the wife's benefit, or that she was expected to act upon the information conveyed by it. *Western Union Tel. Co. v. Kirkpatrick*, 37.
5. **NOTICE FROM FACE OF MESSAGE.** — In telegraph messages conveying information relative to sickness or death, it is only in cases where the language used is sufficient to suggest to the company that a near relationship exists between the party named in the message and the party addressed, and that the object is to afford the latter an opportunity of visiting his relative, that it is sufficient upon its face, without further notice, to render the company liable for damages for mental suffering resulting to him through the negligence of the company in failing to make prompt delivery of the message. *Id.*
6. **SUIT AS PRESENTMENT OF CLAIM.** — Commencement of suit against and service of process upon a telegraph company within sixty days after sending a message is equivalent to presentment of the claim, and dis-

penses with compliance with a condition on the company's blank that it will not be liable in any case where the claim is not presented in writing within sixty days after sending the message. *Western Union Tel. Co. v. Henderson*, 148.

7. **FREE-DELIVERY LIMITS — DUTY OF SENDER OF DISPATCH TO KNOW.** — Where a telegraph company has established free-delivery limits, notice of which is given on its blanks, the duty is on the sender of the dispatch of ascertaining whether the person to whom the message is sent resides within the free limits, and to make provision for delivery if such person resides beyond them, and to notify the sending operator of the fact. A failure to observe this duty will excuse prompt delivery by the company. *Id.*
8. **FREE-DELIVERY LIMITS — DUTY OF COMPANY.** — Where a telegraph company has established free-delivery limits, notice of which is given on its blanks, and a message is handed in for transmission without explanation, the presumption is, that the sendee lives within the free-delivery limits, and the sender takes the risk of delivery, unless he arranges for delivery at a greater distance. In such case, the transmitting operator is under no duty other than to forward the message accurately, with proper diligence; and the terminal operator is under no other duty than to copy the message correctly, and deliver it with all convenient speed, if the sendee resides within the free-delivery limits. *Id.*
9. **FREE-DELIVERY LIMITS — BURDEN OF PROOF.** — Where a telegraph company has established reasonable free-delivery limits, notice of which is given on its blanks, a conditional obligation is created, contingent on the sendee's residence being within such limits; and the burden of proof is on the sender of the message to show that the sendee resided within such limits, before the company can be held liable for want of prompt delivery. *Id.*
10. **MENTAL ANGUISH AS ELEMENT OF DAMAGES FOR DELAY IN DELIVERY OF DISPATCH.** — Where the face of a dispatch plainly suggests the necessity for prompt delivery, if within the free-delivery limits established by the company, the sender's mental anguish is an element for which damages may be recovered for delay in delivery. *Id.*
11. **NON-REPEATED MESSAGE.** — Where a non-repeated message was correctly and without delay transmitted to the terminal office, and there received, understood, and copied correctly, and an action is brought for delay in its delivery, the stipulation in regard to non-repeated messages contained in the printed blanks of the company is inadmissible in evidence, and has nothing to do with the case. *Id.*
12. **EVIDENCE OF BUSINESS CONDITIONS TO EXCUSE LIABILITY.** — Where a telegraph company has contracted to transmit and deliver a message, it cannot excuse its liability for non-delivery on the ground that the business and emoluments of the terminal office were insufficient to justify the employment of an operator, or a messenger-boy to deliver messages. *Id.*
13. **EVIDENCE OF PHYSICIAN'S CUSTOM IN ANSWERING CALLS.** — Where a telegraph company has contracted to transmit and deliver a message summoning a physician, it cannot excuse its liability for delay in delivery by proof that it was not the custom of the physician to make professional calls at a distance, without prepayment, or guaranteed payment, of his charges. *Id.*

See *ESTOPPEL*, 2.

TIME.

See VENDOR AND VENDEE, 10, 11.

TRADE-MARKS.

1. **TRADE-MARKS AFTER THE DISSOLUTION OF PARTNERSHIP.** — Upon dissolution of a firm having established trade-marks, and a good-will which has not been disposed of upon such dissolution, each member of the late firm may lawfully use such trade-marks in the prosecution of his business. *Caswell v. Hazard*, 833.
2. **PRACTION ON APPEAL.** — If a judgment is reversed, and a new trial ordered by the general term, on questions both of law and of fact, such judgment of reversal must be affirmed if the record presents any error either of law or of fact made by the trial court. *Id.*
3. **THE RIGHT OF EVERY PERSON TO USE HIS OWN NAME** in the prosecution of his business cannot be disputed or limited, unless such name has become the trade-mark or business sign of another, or is being used to deceive the public or defraud the person who made it valuable. *Id.*
4. **PARTNERSHIP TRADE-MARKS.** — **THE RIGHT TO A TRADE-MARK IS DERIVED FROM ITS APPROPRIATION AND CONTINUED USER**, and becomes the property of those who first gave it a name and reputation. It becomes a part of the assets of the firm by which it was used and established, and can be owned, transferred, and sold like other species of property. *Id.*
5. **TRADE-MARK OF WHICH THE NAME OF THE MEMBERS OF A FIRM IS PART** may, upon the dissolution of the firm, without disposing of it, be used by either member, and neither has, after such dissolution, any such exclusive right to the use of his own name as entitles him to the aid of equity to prevent the use by either of the trade-marks of the late firm, of which the names of both members were a part. *Id.*
6. **TRANSFER OF PROPERTY UPON WHICH A TRADE-MARK IS INDELIBLY IMPRESSED OR IMPRINTED**, of which the name of the vendor is a part, and which property is known to be intended for sale, gives the vendee the right to sell such property with such trade-mark thereon, and the vendor has no right to restrain such sale because the property bears such trade-mark including his name as a part thereof. *Id.*
7. **TRADE NAME, RIGHT OF MEMBERS REMAINING IN THE FIRM TO USE.** — Such members of a dissolved firm having acquired an established reputation for the character and quality of goods manufactured and sold by them, who desire to continue in business under the former firm name, have a right to do so, although none of the parties continuing in business bear the names contained in the original firm; but to retain this right, the persons continuing in the firm must comply with the requirements of the statutes of this state relating to that subject. *Id.*

TRADE NAME.

See TRADE-MARKS.

TRANSFER OF STOCK.

See CORPORATIONS, 21-23.

TRIAL.

1. CHARGE OF COURT MUST BE CONSTRUED AS A WHOLE in connection with the evidence, and not in disconnected parts, or by garbled extracts, to which exceptions are taken. *Gibson v. State*, 96.
2. SUBSTANTIAL MISDIRECTION OF JURY, GROUND FOR NEW TRIAL. — The supreme court cannot say that a judgment is for the right party, and ought to be affirmed, when there has been a substantial misdirection of the jury upon a question of law bearing upon the issues of fact to be tried by the jury, but for which they might have reached a different conclusion. *Cottrill v. Krum*, 549.
3. MEANING OF ORDINARY WORDS IN INSTRUCTIONS NEED NOT BE EXPLAINED WHEN. — It is not necessary that the meaning of ordinary words and phrases, such as "diligent inquiry," used in their usual and conventional sense in instructions to the jury, should be defined or explained. *Id.*
4. ISSUE UPON WHICH THERE IS NO EVIDENCE need not be submitted to the jury. *Bonds v. Illinois Central R'y Co.*, 381.
5. INSTRUCTIONS GIVEN AT INSTANCE OF STATE in this case, held not liable to any valid objection. *State v. Clayton*, 565.
6. DEFENDANT DOES NOT WAIVE HIS DEMURRER TO PLAINTIFF'S EVIDENCE by putting in his own evidence; he thereby takes the chance of aiding the plaintiff's case, but is not deprived of his right to ask the court to direct a verdict on all the evidence. *Weber v. Kansas City Cable R'y Co.*, 541.
7. SAVING OF EXCEPTIONS, WHAT SUFFICIENT. — A recital in a bill of exceptions that "said instructions, numbers 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, as asked, the court refused, to which refusal of the instructions thus asked the defendant, by its counsel, then and there excepted at the time," entitles the party so excepting to have each refused instruction considered in the supreme court. *Id.*
8. GROUND ASSIGNED FOR NEW TRIAL, WHAT SUFFICIENT. — "A ground assigned for a new trial, that the court erred in refusing to give instructions numbers 10 to 22, inclusive, asked by the defendant," is sufficient. *Id.*
9. PARTY TO ACTION BOUND BY RULINGS OF COURT OBTAINED ON HIS OWN MOTION. — A party to an action is bound by the rulings of the court which he obtains upon his own motion, and is estopped from claiming such ruling as error. And where a plaintiff sues to recover the price of certain cigars sold to the defendant, and the latter seeks to recoup damages caused by a breach of contract by the plaintiff, and the court sustains a demurrer to the answer, on the ground that the contract was void, being in restraint of trade, whereupon the defendant amends his answer, and sets up the same contract as an absolute defense, but the court, upon the conclusion of the trial, finds that the contract was not void, and gives judgment for the plaintiff, the plaintiff is estopped from receiving the benefit of the latter ruling of the court, to the effect that the contract was valid, and such latter ruling, though correct, deprives the defendant of a substantial right. And for the purpose of determining whether the defendant was deprived of a substantial right in such a case, the supreme court will look into the original answer in the case. *Newell v. Meyendorf*, 738.

See MARRIAGE AND DIVORCE, 2; WITNESSES, 1.

TRUSTS.

See BROKERS, 2; CORPORATIONS, 5-10.

VARIANCE.

See PLEADING, 2, 3.

VENDOR AND VENDEE.

1. **CONTRACT FOR SALE OF LAND—DUTY OF VENDOR TO MAKE DEED.** — Where, under a contract for the sale of land, the vendor agrees to give a perfect deed upon compliance and demand by the vendee, the vendor must be prepared to have a complete title when the vendee, having complied on his part, demands a deed; and although entitled thereafter to a reasonable time in which to prepare and deliver the deed, the vendor is not entitled to a reasonable time in which to perfect a defect in the title. *Gregory v. Christian*, 507.
2. **DEFECT IN TITLE** when the contract for the sale of land is made is no ground of objection thereto, if removed before the time fixed for completing the purchase. *Id.*
3. **CONTRACT FOR SALE OF LAND—DUTY OF VENDOR TO MAKE DEED.** — At law, the vendor must show a good title by the time appointed for the completion of a sale of land under a contract of sale, and the effect of a breach of the contract in this respect, upon compliance and demand for a deed by the vendee, is not avoided by the vendor's subsequent ability to comply, even before suit is brought. *Id.*
4. **CONTRACT FOR SALE OF LANDS—TENDER OF DEED BY PURCHASER.** — The vendee under a contract for the sale of lands, having performed his part of the contract, need not tender the vendor a deed for his signature thereto, when the latter has denied the vendee's right to a conveyance under the contract. *Davis v. Robert*, 126.
5. **MARKETABLE TITLE.** — A vendee cannot be compelled to take an unmarketable title when he has stipulated for a good one. A title is unmarketable when there is reasonable doubt, in law or in fact, as to its validity. Such doubt, if raised upon a question of law, to be sufficient, must be one upon which the judicial mind would hesitate before deciding it; and if raised upon a question of fact, and there is no doubt as to how the fact is, and the proof is readily accessible to show how it is at any time, the title is not rendered doubtful by depending upon it. *Hedderly v. Johnson*, 521.
6. **RESERVATION IN DEED—MARKETABLE TITLE.** — A reservation by the grantor in a conveyance of real estate of a "strip of land one hundred and fifty feet wide, to be used by the said railroad company for a right of way or other railroad purposes, where the main line of its road, or any of its branches, as now located and constructed, or hereafter to be constructed, is laid or may pass over said premises," applies only to the location of the line of road as it exists at the time of the execution of the deed. If it is admitted that no line of railroad had then been located on the tract, there is no doubt of the validity of the grantee's title, and it is good and marketable. *Id.*
7. **PLEADING—RECOUPMENT OF DAMAGES.** — If a vendor, sued to recover moneys paid to him under a contract to purchase real estate, desires to recoup any damages done him by the plaintiff's failure to comply with such contract, he must specially plead such damages. *Clardy v. Folger*, 187.

8. **VENDOR'S LIEN FOR RIGHT OF WAY.**—A lien equivalent to a vendor's lien exists in case of a grant of way, where the consideration for the grant is not paid. *Howe v. Harding*, 17.
9. **ESTOPPEL.**—**TITLE TO REAL ESTATE** cannot be thrust upon a vendee by a deed which he is under no obligation to accept, and does not accept; nor can he be bound by a release which he justly refuses to accept. *Cannon River Mfrs'. Ass'n v. Rogers*, 497.
10. **COMPLIANCE WITH CONDITION OF ORAL CONTRACT OF SALE—TIME ESSENTIAL.**—Where the vendee deposits the purchase price of land in bank under an oral agreement made at the time with the vendor that he shall receive it upon delivery by him to the bank of the instruments of title named in the conditions of deposit within a specified time, he is entitled to receive it only upon compliance with such conditions within such time. Time is of the essence of such contract, and it cannot be enforced upon compliance with the conditions named after the time specified. *Id.*
11. **TIME IS OF THE ESSENCE OF A CONTRACT FOR THE SALE AND PURCHASE OF REAL ESTATE**, when it declares that "in the event of the failure to comply with the terms hereof by the party of the second part, the party of the first part shall be released from all obligations in law or in equity to convey such property, and the party of the second part shall forfeit all right thereto." *Cleary v. Folger*, 187.
12. **FORFEITURES ARE NOT FAVORED IN COURTS OF EQUITY**, and are never enforced if couched in ambiguous language. *Id.*
13. **FORFEITURE OF MONEY PAID ON A CONTRACT FOR THE SALE AND PURCHASE** of real property cannot be enforced where both parties have failed to comply with the contract, as where the vendee has failed to pay the balance of the purchase-money within the time stipulated by the contract, and the vendor has, on his part, neglected to tender a conveyance, and to demand such payment. *Id.*
14. **CONTRACT, TERMINATION OF—RECOVERY OF MONIES PAID ON.**—If time is of the essence of a contract, and each of the parties neglects within the time designated to tender performance thereof, the contract terminates, and any moneys which have been paid thereon may be recovered of the party to whom they were paid. *Id.*
See **FIXTURES**, 1, 2; **INFANTS**, 1-5.

VENDOR'S LIEN.

See **ESTOPPEL**, 4.

VICE-PRINCIPAL.

See **MASTER AND SERVANT**, 5.

VOLUNTARY ASSOCIATIONS.

1. **DECISIONS OF VOLUNTARY ASSOCIATIONS NOT INTERFERED WITH BY COURTS WHEN.**—The decisions of any kind of a voluntary society or association in admitting, disciplining, suspending, or expelling members are of a *quasi* judicial character, and the courts will never interfere in such cases, except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, in good faith, and not in violation of the law of the land. If it is found that the proceeding was had fairly, in good faith, and pursuant to its own laws, and that there was nothing

- in it in violation of the law of the land, the sentence is conclusive, like that of a judicial proceeding. *Connelly v. Masonic Mut. B. Ass'n*, 296.
2. **DECISION OF GRAND MASTER OF MASONS, WHEN FINAL.** — Where the grand master of Masons has, under the rules and laws of the organization, jurisdiction and authority to determine whether or not a vote of a Masonic lodge rendering a member unaffiliated is valid, and he decides that the vote by which a member was rendered unaffiliated was void, and orders him to be restored as of the date of his apparent suspension, his decision is final and conclusive; and if the lodge thereupon reverses the vote of unaffiliation, such member is thereby restored to membership, and stands as if no such vote had ever been passed. Nor is such decision affected by the fact that it was not rendered until after the death of the member. *Id.*
 3. **DECISION OF DEPUTY GRAND MASTER OF MASONS NOT OPEN TO REVIEW WHEN.** — Where it is found that a deputy grand master of Masons had jurisdiction to act in a matter, his decision upon a question of fact involved in the case is not open to review by a court of law. *Id.*

WAGES.

See ATTACHMENT, etc., 3, 4.

WAIVER.

See ASSUMPSIT, 2-7; ESTOPPEL, 4; FRAUD, 10.

WAREHOUSEMEN.

- DAMAGES FOR INJURY FROM NEGLIGENTLY STORING FREIGHT.** — Where a warehouseman receives heavy freight, and stores it in such a negligent manner that the consignee or his agent, while exercising reasonable care, and without negligence, is injured in attempting to remove it, the warehouseman is liable in damages for the injury received. *Mallory v. Smith*, 40.

WARRANT.

See ARREST, 1-3.

WARRANTY.

See AGENCY, 4; SALES, 1, 2-5.

WATER COMPANIES.

See MUNICIPAL CORPORATIONS, 1-5.

WATERCOURSES.

1. **TO CONSTITUTE A WATERCOURSE**, it is not necessary that water shall flow in the bed or channel of the stream all the year. *Spangler v. San Francisco*, 153.
2. **RIGHT TO DRAIN LAND BY TILES.** — The owner of the dominant estate may drain the water falling upon his land, by means of underground tiles, into a natural drainage channel upon his land, through which it is cast upon the lower or servient estate. *Vannest v. Fleming*, 387.
3. **DRAINAGE BY ACQUIESCENCE — RIGHT TO DAM.** — Where a drainage ditch upon their respective lands has been established by two adjoining proprietors, either by express agreement or by mutual acquiescence, and

such ditch is required by the best interests of both proprietors, and the manner of its construction is in accord with the natural flow of the water, which is not diverted, nor the quantity increased, it cannot be dispensed with, nor its course changed by means of a dam, without the consent of both proprietors, and the rights thus acquired pass to their grantees. *Id.*

4. **DRAINAGE BY AGREEMENT—RIGHT TO CHANGE.**—Where adjoining land-owners have jointly constructed a drainage ditch over their lands, under an oral agreement as to its course, and each has contributed labor and money in its construction, afterwards plowing and farming in accord with it, neither can set it aside, without the consent of the other. *Id.*
5. **DRAINAGE BY LICENSE.**—The assent of a land-owner to the construction of a drainage ditch over his land is in the nature of a license, which having been accepted, and the rights conferred assumed and exercised, cannot be set aside or disregarded. *Id.*

See MUNICIPAL CORPORATIONS, 4-11.

WAYS.

See HIGHWAYS.

WELLS.

See LANDLORD AND TENANT, 1-3.

WILLS.

1. **EVIDENCE OF TESTAMENTARY CAPACITY.**—Where a testator, after the commencement of his fatal illness, formally executes a codicil to his will, it is competent to prove, on the issue of testamentary capacity, that previously to such illness he was of sound and disposing mind and memory, and that prior thereto, and a week before his death, he expressed his intention and arranged to have the will changed in the way it was changed by the codicil. *Hammond v. Dike*, 503.
2. **EVIDENCE OF TESTAMENTARY CAPACITY.**—The nature and terms of a will are to be judicially regarded as an essential and important part of the evidence of testamentary capacity, and its consistency or inconsistency must also be regarded with relation to the situation, natural inclinations, and previously declared intentions of the testator. This rule is applicable in cases of doubtful capacity from death-bed sickness; and the declarations of the testator, especially if recent, and made when his mind was confessedly sound, are admissible to aid in determining whether the will is the product of a sane mind. *Id.*

WITNESSES.

1. **JURY, AND NOT COURT, IS JUDGE** of the credibility of witnesses and the sufficiency of the evidence. *Gibson v. State*, 96.
2. **INADMISSIBLE EVIDENCE TO IMPEACH.**—The bill of exceptions taken in a former trial containing the testimony then given by a witness is inadmissible for the purpose of impeaching him or contradicting his evidence given upon another trial of the same case. *Pennsylvania Co. v. Marion*, 330.
3. **IMPEACHMENT OF, BY DEPOSITIONS.**—Depositions of witnesses taken before a trial are inadmissible to impeach the testimony of the same witnesses given at the trial, unless the proper foundation is first laid by directing the attention of the witnesses to the particular matters involved

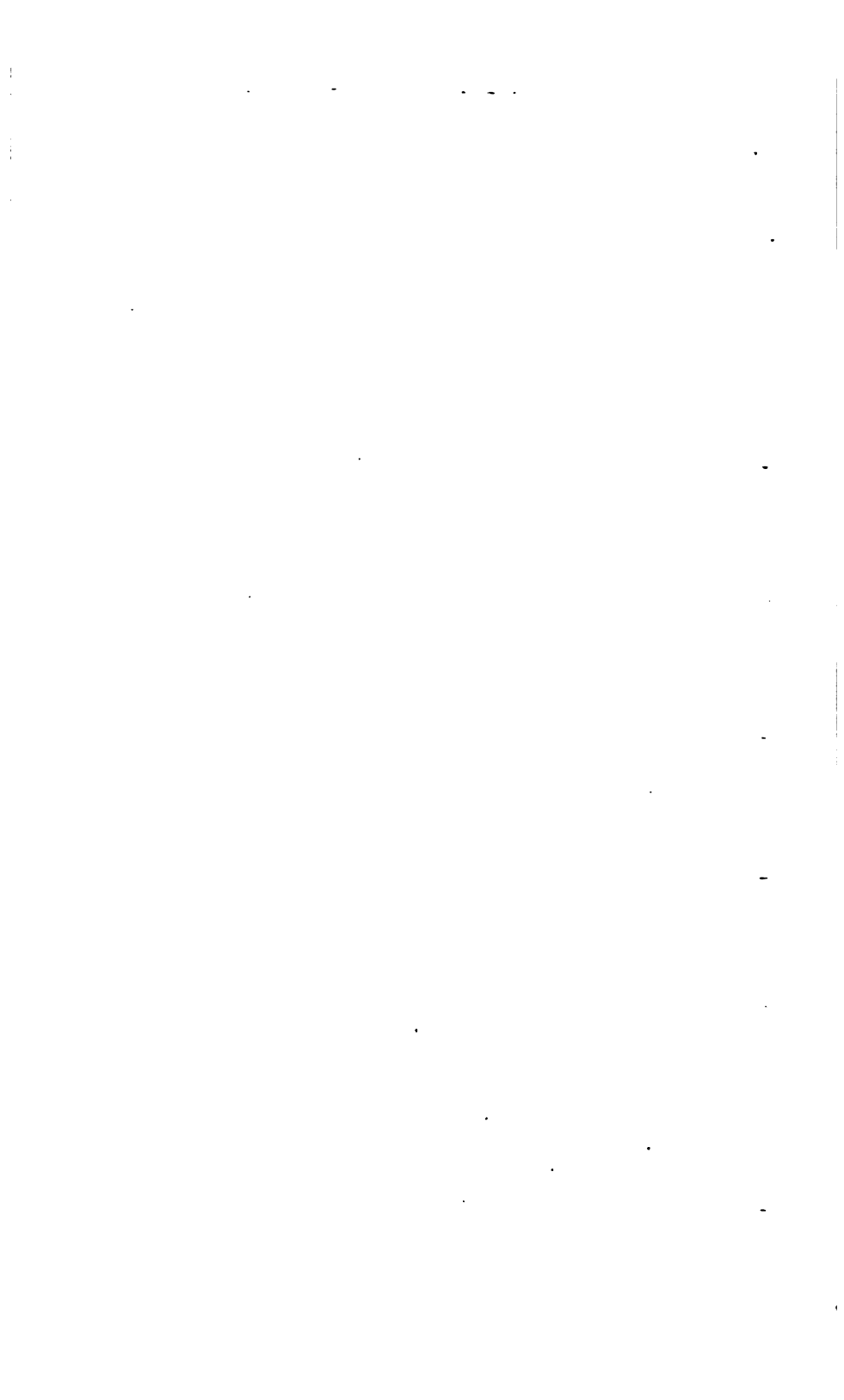
in the supposed contradiction, and giving them an opportunity to explain. *Hammond v. Dyke*, 503.

4. **COMPETENCY. — WIDOW**, though interested in the result of the action, is competent to testify to matters relating to her deceased husband's estate, except as to transactions and communications between themselves. *Norris v. Stewart*, 917.
5. **COMPETENCY — WAIVER OF OBJECTION TO.** — Where the wife of a deceased husband is proceeding to testify to inhibited transactions and communications between themselves, objection should be made at the time or it will be deemed to have been waived. *Id.*
6. **EXPERT WITNESSES, QUESTION TO MUST NOT LEAVE THEM TO DETERMINE TRUTH OF EVIDENCE.** — Expert witness who has heard the evidence on the trial of one accused of murder, and whose defense is that he was insane at the time of the homicide, should not be permitted to answer whether, upon all the testimony, the acts of the defendant on the night of the homicide, and upon the testimony as to his past life given by the witnesses in his defense, he is insane, because such question leaves the expert not only to recollect the evidence for himself, but also to determine the credibility of the witnesses, and the probability or improbability of their statements. *People v. McElvaine*, 820.
7. **EXPERT WITNESSES — OPINIONS OF EXPERT WITNESSES MUST BE BASED UPON HYPOTHETICAL QUESTIONS** containing facts assumed to have been proven, and not upon what he had heard other witnesses testify. *Id.*
8. **COMPETENCY OF PHYSICIAN — PRIVILEGED COMMUNICATION.** — In an action to recover for injuries received in attempting to alight from a moving train, the physician who dressed plaintiff's injuries is incompetent to testify to the conversation which occurred between them at that time relative to the manner in which the injuries were sustained. Such conversation is a privileged communication. *Pennsylvania Co. v. Marion*, 330.

See **CRIMINAL LAW**, 1; **EVIDENCE**, 1; **FRAUDULENT CONVEYANCES**, 5.

WRITS.

See **PROHIBITION**, 1-2.





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